Supreme Court, U.S.
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No. 00-___

IN THE

Supreme Court of the United States

Indeck Energy Services, Inc.,
and Indeck Saginaw Limited Partnership,
Petitioners,

v.

Consumers Energy Co. and
CMS Energy Corporation,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 19, 2001

QUESTION PRESENTED

This is an antitrust suit brought by petitioners against monopolistic competitors. The complaint details not only respondents' anticompetitive practices but also the manner in which the anticompetitive aspects of respondents' conduct have injured petitioners. Those assertions are sufficient to allege "antitrust injury" under this Court's precedents, as well as decisions of several circuits. The Sixth Circuit nonetheless held that petitioners' complaint was properly dismissed as a matter of law because it does not sufficiently allege that respondents' conduct harmed consumers. Regarding other allegations of the complaint, the Sixth Circuit furthermore held, again in conflict with this Court's precedents and decisions of other circuits, that a competitor lacks "antitrust standing" to challenge the anticompetitive pricing practices of its rivals.

The Question Presented is:

Whether the Sixth Circuit applied an erroneous standard for pleading "antitrust injury" and "antitrust standing"?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are named in the caption.

RULE 29.6 STATEMENT

Petitioner Indeck Saginaw Limited Partnership is a wholly owned subsidiary of petitioner Indeck Energy Services, Inc., which is in turn wholly privately owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Indeck Energy Services, Inc., and Indeck Saginaw Limited Partnership respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the district court dismissing the complaint (Pet. App. 11a-26a), the court of appeals affirming (*id.* 1a-10a), and the court of appeals denying rehearing and rehearing en banc (*id.* 27a) are unpublished.

RELEVANT STATUTORY PROVISIONS

The provisions of the Sherman and Clayton Antitrust Acts relevant to this action are reproduced in the appendix (Pet. App. 63a-66a).

JURISDICTION

The court of appeals entered its opinion on October 6, 2000, and denied a timely petition for rehearing and rehearing en banc on December 20, 2000. Justice Stevens subsequently extended the time to file this petition to and including April 19, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This is an antitrust action brought by a private plaintiff against a vertically integrated, monopolist defendant. The question presented is whether the Sixth Circuit imposed an erroneous standard for alleging antitrust injury and antitrust standing in conflict with decisions of this Court and numerous other circuits. Given the question presented, the reader will benefit substantially from reviewing the bolded paragraphs of the complaint relating to antitrust injury (see Pet. App. 42a-62a) before studying the substance of the petition and any opposition thereto.

1. As detailed in the complaint, Indeck Energy Services, Inc., and its subsidiary Indeck Saginaw Limited Partnership (collectively, "Petitioner" or "Indeck") compete against Consumers Energy Company and its parent CMS Energy Corp. (collectively, "Respondent" or "Consumers") to sell electricity to large industrial customers in southern Michigan. Petitioner operates "co-generation" systems that provide power for those customers. Respondent, which holds the public utility monopoly for the region, markets electricity to the same customers through the traditional electric power grid and holds a monopoly position in the market ("the Relevant At Risk Market"). See Compl. ¶¶ 1, 5, 7, 12-14.

Petitioner and respondent are not merely competitors in the market for electricity sales. Instead, respondent's monopoly control over other elements of power supply enables respondent to preclude independent co-generation producers such as petitioner from competing in the Relevant At Risk Market. To provide co-generation services, an independent producer both requires access to physical facilities such as electrical transmission lines (through which the independent can both import and export electricity) and also must negotiate contracts that allow commercial customers to secure "stand-by" (*i.e.*, back-up) electric power. Respondent is the principal potential supplier of those facilities and services. Specifically, respondent's public utility franchise gives it monopoly control over both access to the transmission facilities required to carry excess power from petitioner's co-generation plants to third parties and to carry stand-by power from other sources to petitioner's co-generation customers. Respondent also has monopoly control over the stand-by power itself. Furthermore, in order to operate in an economical manner, independent producers such as petitioner must sell excess power produced by their co-generation facilities to third parties on the wholesale market. Respondent, as the principal retail power supplier in the region, is also the prin-

cipal potential purchaser of this excess power. See Compl. ¶¶ 15, 27, 28.

2. Petitioner's complaint alleges that respondent engaged in a variety of anticompetitive acts that purposefully injured petitioner and other independent power producers, the independents' ability to compete, and competition in the market for retail power. Respondent's conduct caused Indeck alone to incur damages in excess of $100 million, which petitioner seeks to recover under Section 4 of the Clayton Act. See Compl. ¶¶ 7, 79.

The complaint alleges black-letter refusal to deal and essential facilities theories as the principal basis for its claims of monopolization, attempted monopolization, illegal discounting, and illegal exclusive dealing. Thus, petitioner asserts that respondent exploited its monopoly power over transmission services by requiring independents to pay anticompetitive rates for those services to import power and also to export excess power from co-generation facilities. Respondent also exploited its monopoly power over the traditional power grid to charge independents anticompetitive rates for the stand-by power necessary to make co-generation facilities viable. In these respects, petitioner asserts that respondent engaged in anticompetitive conduct directed specifically at independent power producers, including petitioner, all in an effort to exclude independents as competitors. See Compl. ¶¶ 28-32.

The complaint separately alleges as an additional theory that respondent engaged in a "price-cost squeeze" designed to drive independents from the marketplace. This theory in part involves respondent's conduct towards the customers for which petitioner and respondent compete. Specifically, to reduce the "price" (*i.e.*, income) independents could receive for their co-generation services, respondent offered large industrial customers (including General Motors) massive discounts to enter into long-term contracts to secure power from respondent rather than independents. But respondent went far beyond merely offering customers reduced prices – it condi-

tioned those prices on an agreement not to enter into co-generation agreements with petitioner or other independent producers. Respondent further reduced independents' income by purchasing power only from respondent's own co-generation affiliate, thus refusing to purchase excess power produced by the independents at competitive rates. The "cost" elements of the squeeze are the acts underlying the refusal to deal and essential facilities claims described in the previous paragraph: respondent raised independents' costs by charging anticompetitive rates for transmission services and stand-by power. See Compl. ¶¶ 33-42.

Petitioner's complaint explicitly alleges that respondent's anticompetitive conduct injured both independent power producers and competition generally. For example:

> In short, [respondent has] succeeded in excluding competition from over 80 percent of the Relevant At Risk Market while at the same time keeping potential supplemental and alternative sources of electrical power out of the market. [Respondent's] anticompetitive and tortious acts have caused substantial injury to Indeck and have also injured competition in the Relevant At Risk Market by:
>
> (a) preventing the development of competing independent power facilities, thereby constraining the market entry of efficient new capacity;
>
> (b) depriving customers of competing low-cost alternatives for electric power; and
>
> (c) wrongfully steering its capacity needs to its own affiliate to the exclusion of competitive sources of independent power production.

Compl. ¶ 44.

The question presented by this petition turns on what the complaint does *not* allege. In addition to the just-quoted excerpt, petitioner's complaint specifically alleges at least four

additional times that respondent's conduct excluded competitors,[1] and at least six additional times that respondent's conduct specifically injured competition.[2] But the Sixth Circuit took the view that the complaint does not contain sufficient allegations that the consumers for whom petitioner and respondent compete – *i.e.*, large industrial customers – were injured by respondent's anticompetitive acts.

3. In the district court, respondent moved to dismiss the complaint for failure to state a claim as a matter of law under

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[1] See Compl. ¶ 2(b) (respondent's scheme included efforts to "stall and frustrate the efforts of Indeck and other independent power producers to enter the market by denying them meaningful access to essential facilities and resources available only from [respondent]"); *id.* ¶ 18 (respondent "responded to the threat of competition from Indeck and other independent power producers with an anticompetitive campaign to prevent the independents from successfully taking root and competing with them for customers"); *id.* ¶ 21 (respondent "attempted to thwart the efforts of Indeck and other independents to develop independent power projects within [respondent's] monopoly service territory"); *id.* ¶ 43 (respondent "unlawfully foreclosed Indeck and other true independents from providing retail power to the Relevant At Risk Market").

[2] See Compl. ¶ 4 (respondent "blocked Indeck and other independents from entering the market and thereby injured competition"); *id.* ¶ 15 (respondent's historic anticompetitive conduct "thwarted competition from independent power producers"); *id.* ¶ 19 (respondent "excluded the entry of new competitive sources of capacity"); *id.* ¶ 29 (respondent "exploited [its] control over its essential support facilities and resources to deter Indeck's market entry and the entry efforts of other independents. [Respondent] has thereby maintained its monopoly control over the retail sale of electricity in the Relevant At Risk Market."); *id.* ¶ 46(f) (defendant's anticompetitive conduct included "[s]uppressing competition by eliminating competitive cogeneration projects"); *id.* ¶ 62 (defendant's actions "have the tendency to substantially lessen competition").

FRCP 12(b)(6), arguing that petitioner had not suffered antitrust injury. Because respondent's motion raised only a purely legal objection to the complaint, the district court did not permit discovery on the substance of the antitrust allegations, including petitioner's claim of antitrust injury, and petitioner furthermore did not submit evidence on that issue. See Prelim. Case Mgmt. Ord. (Nov. 26, 1997). Inexplicably, however, the district court *sua sponte* converted respondent's motion into a request for summary judgment on the antitrust injury issue and dismissed the complaint based on petitioner's failure to submit sufficient evidence to prove the complaint's allegations. See generally Pet. App. 23a-25a. According to the district court, petitioner (i) "ha[d] not shown how discount contracts with large customers destroy or injure competition," *id.* 24a; (ii) "ha[d] not provided evidence to support the allegations that Consumers favored [its co-generation affiliate] or denied access to essential facilities, much less that such activities constitute an injury to competition," *id.*; and (iii) had made "no showing that competition within the electric utility industry has been reduced by Consumers' alleged actions," *id.*[3]

4. Petitioner appealed, arguing that its complaint stated a valid claim as a matter of law and that, because no discovery had been permitted and no evidence had been introduced on the antitrust injury allegations, the district court erred in granting summary judgment for failure to adduce sufficient

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[3] The district court also dismissed the complaint on the ground of state action antitrust immunity and, by separate opinion, dismissed respondent CMS Energy Corp. as a defendant. See Pet. App. 28a-41a, 15a-22a. The Sixth Circuit expressly stated that it was not ruling on either of those questions, see *id.* 2a, 9a, so both remain open for consideration on remand. Of note, the State of Michigan filed as an *amicus* in both the district court and the court of appeals arguing that respondent's purported state action defense should be rejected.

evidence. Pet'r C.A. Br. 43-46. In response, Consumers did not dispute that the complaint could not properly be dismissed based on a failure of proof, but argued that the judgment should be affirmed because the complaint failed to allege antitrust injury as a matter of law. Resp. C.A. Br. 45-46.

As to the governing legal standard, respondent acknowledged that, under this Court's precedents, "antitrust injury" is "'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" Resp. C.A. Br. 43 (quoting *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). But respondent urged the court of appeals to apply its settled precedent, which had been "reasonably aggressive in using the antitrust injury doctrine" to bar suits by competitors. *Id.* at 44 (quoting *Valley Prods. Co.* v. *Landmark*, 128 F.3d 398, 403 (CA6 1997)). As to the substance of the complaint, respondent addressed only petitioner's specific allegations relating to the contract with General Motors, arguing: "The important point is that GM canceled its contract with Indeck, and there has been no contention that GM was not within its rights in doing so." *Id.* at 45. Respondent thus did not defend the dismissal of the complaint with respect to petitioner's allegations that respondent engaged in a refusal to deal and withheld access to essential facilities, and further did not address petitioner's allegation of an unlawful "price-cost squeeze."

The Sixth Circuit nonetheless affirmed, holding that petitioner's complaint in all respects failed to allege antitrust injury as a matter of law. From the outset, and in four separate instances, the court of appeals expressly recognized that petitioner's complaint alleges that respondent's conduct reduced competition:

> (i) "Consequently, Indeck asserts, Consumers Energy 'succeeded in excluding competition from over 80 percent of the Relevant At Risk Market while at the same time keeping potential supplemental and alternative

> sources of electrical power out of the market,'" Pet. App. 3a;
>
> (ii) "The plaintiff argues that such contracts not only excluded Indeck from the market but also caused the customers to lose low-cost alternatives to Consumers Energy's product," *id.* 7a;
>
> (iii) "The plaintiff argues that the selection of Midland effectively eliminated Indeck and all other competitors from the co-generation market in eastern Michigan," *id.* 7a; and
>
> (iv) "The plaintiff asserts that such action by Consumers Energy placed Indeck 'in an exclusionary "'price-cost' squeeze" that hampered competition for customers,'" *id.* 8a.

But the court of appeals found these allegations insufficient. Instead, the Sixth Circuit held (without citing any supporting authority from *any* court) that a plaintiff suing on the basis of its rival's anticompetitive conduct cannot establish antitrust injury by alleging (as petitioner's complaint unquestionably does) that the defendant's conduct injured competition. To avoid dismissal, the plaintiff must also allege both (i) that the plaintiff has been completely excluded from the marketplace, and (ii) that consumers were injured as a result. Thus, the court held:

> Significantly, the only harm allegedly suffered by Indeck was in the company's capacity as a competitor in the marketplace, not as a defender of marketplace competition. Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that *exclusion* of the competitor from the marketplace results in the *elimination* of a superior product or a lower-cost alternative.

Pet. App. 5a-6a (emphasis added).[4]

The court of appeals did not otherwise expand upon its holding with respect to the principal allegations of the complaint – *i.e.*, respondent's refusal to deal and its denial of access to essential facilities. Instead, the court concluded as a matter of law that, although petitioner had sufficiently alleged (i) that respondent had engaged in anticompetitive conduct directed specifically at petitioner and other independents, (ii) that this conduct had undermined competition, and (iii) that petitioner had been injured by the anticompetitive aspects of respondent's conduct, see *supra* at 7a-8a, the complaint must be dismissed because of the failure to allege that consumers had been injured as a result.[5]

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[4] The next sentence in the court of appeals opinion is somewhat mystifying. According to the Court: "The record in this appeal presents no indication that competition itself was harmed by any act of the defendants." Pet. App. 6a. Read literally, that statement is doubly wrong. First, given the procedural posture of the case, see *supra* at 6-7, there was no evidentiary record at all on the antitrust injury question and (as respondent has never disputed) the complaint could not be dismissed on that basis. Other portions of the Sixth Circuit's opinion indicate, however, that the court was affirming the dismissal based on the supposed inadequacy of the allegations of the complaint rather than the absence of an "evidentiary record." Pet. App. 5a n.1, 6a, 7a. Second, the complaint manifestly does allege that "competition itself was harmed," as the Sixth Circuit itself repeatedly recognized. See *supra* at 7-8. The court of appeals' reference to "competition" in this context therefore apparently refers to the its holding in the previous sentence of its opinion that a plaintiff must allege that its rival's anticompetitive conduct resulted in the plaintiff's "exclusion" from the marketplace and consumer harm as a result of the "elimination of a superior product or a lower-cost alternative." Pet. App. 6a.

[5] The Sixth Circuit did not doubt that the complaint had alleged sufficiently that petitioner had been shut out of the market. See

The Sixth Circuit did, however, expand upon its holding with respect to the remaining allegations of the complaint – those asserting that respondent's conduct had reduced petitioner's income. But the court refused to consider the anti-competitive effect of the "price-cost squeeze" as a whole, instead separately analyzing each of the allegations relating to lost income apart from the remainder of the complaint. Regarding the complaint's example of the deep discount offered by respondent to General Motors (on the basis of which respondent depressed the price that petitioner could receive for its co-generation services), the court of appeals explained: "No allegation in the complaint indicates in any manner whatsoever how General Motors itself was harmed or how other customers in the energy market suffered by agreeing to a limited power provision agreement with a lower bidder for such energy generation." Pet. App. 6a. See also *id.* 7a (regarding respondent's contracts with other large industrial customers, complaint failed to allege "that it could have served as a true lower-cost alternative to Consumers Energy"). And regarding petitioner's allegation that respondent refused to purchase power from independent co-generators rather than its own co-generation affiliate, the court concluded:

> Once again, Indeck has alleged only injury to itself in not being selected by Consumers Energy to provide co-generational services, not injury to the customers who voluntarily chose to contract with Consumers Energy in a free exchange of payment and benefit. Such an injury to a competitor, rather than to competition, is not the type of injury to which the antitrust laws address themselves. Absent some indication that it could offer a superior product or a lower cost, Indeck has thus failed to allege the requisite antitrust injury on this allegation as well.

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supra at 7a-8a (excerpts from court of appeals' opinion recounting petitioner's allegations).

Id. 8a.

Indeed, the Sixth Circuit extended its basic holding to still further absurd conclusions. The court held that petitioner must allege not only that *it* had been foreclosed from competition, but that *all* competitors had been foreclosed. In addition, and even more remarkably, the court held that petitioner was required to allege that *respondent* – as the would-be consumer for petitioner's excess power – would itself be injured by its *own* anticompetitive conduct. Thus, the court explained:

> What Indeck fails to allege, however, is that Consumers Energy's desire to "buy low" meant that *all other unsuccessful bidders* for Consumers Energy's business *were driven out of the market and* that thereafter *Consumers Energy paid above-market prices for excess power.* Had the plaintiff asserted such claims in its complaint, Indeck might have alleged sufficient facts to defeat the defendant's motion to dismiss.

Id. 8a (emphasis added).

The Sixth Circuit also took the view that, under the antitrust standing doctrine, energy consumers rather than petitioner were the proper plaintiffs to vindicate the allegations of the complaint that respondent sought to depress plaintiff's income through anticompetitive activities. The court thus asserted that "as the direct victim of the alleged antitrust violation in this regard, General Motors-Saginaw could prosecute its own cause of action should it deem the actions of Consumers Energy inappropriate." Pet. App. 6a. It reached this conclusion notwithstanding its simultaneous articulation of the reasons that consumers would lack either standing or an incentive to sue. See *id.* 7a (finding lack of antitrust injury "in light of the discounted rates offered to the customers, in light of the fact that the exclusive contracts were of limited duration, and in light of the fact that the customers were free

to seek other power generators at the conclusion of the contracts").

After the Sixth Circuit denied rehearing and rehearing en banc, this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's standard for alleging antitrust injury and antitrust standing conflicts squarely with decisions of this Court and several other courts of appeals. As those decisions make clear, a plaintiff sufficiently alleges "antitrust injury" by asserting an injury that reflects the anticompetitive nature of the defendant's conduct. Moreover, a competitor has standing to challenge the anticompetitive acts of its rivals. The question presented is also of manifest importance because the standard announced by the Sixth Circuit in this case imposes a nearly insurmountable burden upon antitrust plaintiffs in cases brought against rivals, a result that contravenes the broad purposes of the Sherman and Clayton Acts to protect competition. Indeed, the Sixth Circuit's standard creates a deeply problematic gap in antitrust enforcement in two respects: (i) it imposes a higher burden for alleging injury than is required to allege the *substantive* antitrust violations charged in the complaint; and (ii) it creates a circumstance in which *no* party has standing to redress anticompetitive conduct (because the only possible alternative plaintiffs are indirect purchasers that lack standing under this Court's precedents). Certiorari should therefore be granted and the case set for plenary consideration or, given the manifest conflict between the decision below and this Court's precedents, the judgment should be summarily reversed.

I. The Sixth Circuit's Decision Conflicts With This Court's Precedents.

a. This Court articulated the "antitrust injury" requirement in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in which the owner of several bowling alleys challenged a much larger rival's acquisition of several com-

peting alleys. The plaintiff alleged that the acquisitions would substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. The complaint claimed damages on the theory that, absent the challenged acquisition, the competing alleys would have shut down, leading to greater profits for the plaintiff. See 429 U.S. at 481.

This Court unanimously held that the plaintiff had failed to state a valid antitrust claim, announcing what has since been regarded as the seminal statement of the "antitrust injury" doctrine:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. *The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.* It should, in short, be "the type of loss that the claimed violations * * * would be likely to cause."

429 U.S. at 489 (emphasis added) (quoting *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969)).

Subsequently, this Court has applied the "antitrust injury" test articulated in *Brunswick* in several other cases, never remotely suggesting (as the Sixth Circuit held here) that a plaintiff must allege that its rival's anticompetitive conduct caused consumer injury. For example, in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the Court reiterated the *Brunswick* standard (quoted *supra*) to hold that a plaintiff's allegation that a rival's merger would merely reduce the plaintiff's profits did not constitute "antitrust injury." 479 U.S. at 109. See also *id.* at 115 ("The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust laws, since it resulted only from continued competi-

tion.").[6] And in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990), the Court held that a plaintiff failed to allege antitrust injury when it challenged a competitor's maximum-price-fixing scheme, which (although it might be unlawful) did not damage the plaintiff in any anticompetitive respect. Instead, under the *Brunswick* standard (as reiterated in *Cargill*), the plaintiff's injury must be "attributable to an anticompetitive aspect of the practice under scrutiny." 495 U.S. at 334. In sum, the plaintiff must seek to recover based on "a competition-reducing aspect or effect of the defendant's behavior." *Id.* at 344. See also *id.* at 339 ("Antitrust injury does not arise for purposes of § 4 of the Clayton Act, until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct." (citations omitted)).

This Court's decisions in *Brunswick*, *Cargill*, and *Atlantic Richfield* all make clear that a plaintiff may not assert antitrust injury based merely on profits the plaintiff lost when a defendant reduced its prices, even if the defendant's goal was to drive out competition. Such an injury stems directly from increased price competition, which the antitrust laws were meant to encourage, not forbid. The Court in *Brunswick* thus concluded that the plaintiff's allegations of lost profits were insufficient. "At base," the Court explained, the plaintiff "complain[ed] that by acquiring the failing centers [the defendant] preserved competition, thereby depriving respondents of the benefits of increased concentration." 429 U.S. at 488. Those same precedents make clear, however, that a plaintiff may sue to challenge a rival's pricing activity to the

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[6] The "price-cost squeeze" claim rejected in *Cargill* was very different from that alleged in this case. All of the allegedly anticompetitive conduct in *Cargill* involved the defendants' purchasing from, or selling to, third parties. Specifically, the plaintiffs alleged that they suffered injury by being forced to match the higher price the defendants paid third-party suppliers for inputs and the lower price the defendants accepted from customers for their products.

extent it is truly anticompetitive. The most common and most obvious example is predatory pricing. As the Court explained in *Cargill*, "In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice 'inimical to the purposes of [the antitrust] laws,' *Brunswick*, 429 U.S., at 488, and one capable of inflicting antitrust injury." 479 U.S. at 118 (alteration in original).[7]

b. The Sixth Circuit's decision in this case is irreconcilable with this Court's decisions in *Brunswick* and its progeny. Petitioner's complaint repeatedly alleges that respondent's conduct has reduced competition and that petitioner has been injured as a result of the anticompetitive aspects of respondent's conduct. See generally *supra* at 4-5 & nn.1-2. Indeed, neither the district court, nor the court of appeals, nor even respondent has ever asserted otherwise.

This Court's precedents confirm that petitioner is complaining about the anticompetitive aspects of respondent's conduct. Particularly in point is *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), which found conduct indistinguishable from that alleged by petitioner in this case to be anticompetitive: the defendant power monopoly "refus[ed] to sell power at wholesale to proposed [competing] municipal systems" (directly analogous to respondent's practices regarding the sale of stand-by power to independents), and furthermore "refus[ed] to 'wheel' power to such systems"

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[7] Also in contrast to the Sixth Circuit's exceedingly aggressive use of the antitrust injury doctrine to dismiss petitioner's complaint, this Court has repeatedly "reaffirmed [its] 'traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury.'" *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 573 (1990) (quoting *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981), and citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946)).

(directly analogous to respondent's practices regarding making transmission facilities available to independents). 410 U.S. at 368. The Court found the defendant's conduct to be a plain violation of the Sherman Act because the monopolist sought "to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws." *Id.* at 377.

Similarly, the Court in *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199 (1990), held that a utility suffered antitrust injury when a supplier artificially raised prices (again, directly analogous to respondent's refusal to provide transmission services or stand-by power at reasonable rates). Indeed, as petitioner discusses further *infra* at 18-19, the Court held that "*only* the utility has the cause of action because *it alone* has suffered injury within the meaning of § 4 [of the Clayton Act]." 497 U.S. at 204 (emphasis added). The utility's customers accordingly were not permitted to bring such a suit. *Id.* at 219.[8]

The Sixth Circuit nonetheless sustained the dismissal of petitioner's complaint by imposing a vastly more stringent standard for alleging antitrust injury than any approved by this Court's precedents. Thus, while this Court has required

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[8] Other leading antitrust precedents similarly have held that a monopolist's refusal to deal with, or a monopolist's boycott of, a competitor is anticompetitive. The victim of such conduct accordingly suffers antitrust injury and has the unquestioned right to bring suit under the antitrust laws. See, *e.g.*, *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (wholesale association's refusal to deal with plaintiff competitor is anticompetitive; only question is whether per se rule or instead rule of reason applies); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (when defendant who holds market power refuses to deal with plaintiff competitor in "unnecessarily restrictive way" that can be described as "predatory," conduct is anticompetitive and subject to antitrust liability).

that a plaintiff allege injury based on "an anticompetitive aspect of the defendant's conduct," *Atlantic Richfield*, 495 U.S. at 339, the court of appeals went much further. It held that an antitrust plaintiff may challenge a rival's conduct under the antitrust laws only if it alleges that the defendant's conduct is not merely anticompetitive, but furthermore has injured consumers. See *supra* at 8-11. That holding imposes a substantial additional burden on plaintiffs far beyond this Court's concern that the plaintiff claim damages only from "a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield*, 495 U.S. at 344.[9]

c. The Sixth Circuit's decisions also conflict with this Court's precedents on the question of "antitrust standing."

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[9] Nor did the Sixth Circuit suggest that its decision derived support from this Court's holding that, with respect to consumer pricing, a plaintiff must allege injury based on "predatory" conduct by the defendant rather than merely "lost profits." And it did not. In the first place, petitioner's principal allegations do not relate to respondent's pricing – they arise directly from respondent's refusal to deal with petitioner and respondent's anticompetitive withholding of access to essential facilities. Petitioner is entitled to proceed on those principal allegations regardless of the disposition of the remainder of the complaint. But in any event, petitioner is not seeking as damages the profits it lost when respondent offered customers reduced prices. Instead, petitioner alleges that respondent's pricing practices were but one element of a "price-cost squeeze" that had the purpose and effect of driving independent power producers such as petitioner from the market. Respondent's scheme furthermore conditioned the availability of deep discounts on customers' agreement not to enter into co-generation projects with independents such as petitioner. Such conduct unquestionably meets this Court's definition of "predatory" behavior. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert Bork, The Antitrust Paradox 138 (1978)).

With respect to petitioner's allegations that respondent engaged in anticompetitive pricing, the court of appeals held that, because consumers such as General Motors could assert such a claim, *only* the consumers had antitrust standing to sue. Pet. App. 11a-12a.[10] This Court, however, has squarely rejected the argument that a competitor lacks standing merely because its customers have suffered more direct injury and therefore could also bring suit. In the seminal decision on the question of "antitrust standing," *Associated General Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), the Court held that unions lacked standing to sue on their allegation that the defendant multiemployer association had coerced businesses to use nonunion contractors. "In this case," the Court explained, "the Union was neither a consumer *nor a competitor* in the market in which trade was restrained." 459 U.S. at 539 (emphasis added). The union accordingly lacked standing to sue because it was "neither *a participant in the market* for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices." *Id.* at 540 n.44. See also *id.* at 541 ("If either these firms [subcontractors who lost business as a result of the coercion], or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and * * * they would have a right to maintain their own treble-damages action against the defendants.").[11]

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[10] To reiterate, the Sixth Circuit's holding on the question of antitrust standing is limited to petitioner's allegations regarding pricing. Even if the court of appeals' antitrust standing analysis were sound – which it is not – that analysis does not form a basis for the dismissal of petitioner's principal allegations relating to respondent's anticompetitive refusal to deal and denial of access to essential facilities.

[11] *Associated General Contractors* relied, in turn, on *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), which held that a

Other conflicts with this Court's decisions are apparent as well. As noted above, this Court has repeatedly held that a plaintiff has standing to allege that its rival has engaged in predatory pricing, see *supra* at 14-15-- a claim that, on the court of appeals' view, should instead be brought by consumers. And this Court has specifically cautioned against relying on consumers to vindicate anticompetitive conduct among competitors: "Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers" and "might fail to enforce their claims because of the insignificance of their individual recoveries." *Kansas* v. *Utilicorp United*, 497 U.S. at 215-16.

The Sixth Circuit's own analysis demonstrates the economic irrationality of its exceedingly constrained view of antitrust standing. The court of appeals asserted that General Motors could bring a claim in its own right, but then immediately detailed the reasons that such a plaintiff would lack either an incentive or standing to sue. Respondent's anticompetitive act was to give GM *lower* prices (albeit in exchange for GM's agreement to abandon its contract with petitioner), such that GM would be exceedingly hard-pressed to claim injury. Furthermore, the Sixth Circuit reached the absurd conclusion that, because respondent's refusal to purchase power at a reasonable price from independent producers rather than respondent's co-generation affiliate raised respondent's own costs, the antitrust laws leave it to respondent to

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consumer had standing to sue when injured by the defendant's anticompetitive efforts to limit the use of psychologists. The Court made clear that the market intermediaries – here, petitioner – would have an even more direct claim and basis to sue. 457 U.S. at 479 ("The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably *be restricted* to those competitors whom the conspirators hoped to eliminate from the market." (emphasis added)).

sue itself. See *supra* at 11 (quoting Pet. App. 8a). It is difficult to imagine reasoning more fundamentally in conflict with the pro-competitive purposes of the federal antitrust laws.

d. The manifest conflict between the Sixth Circuit's decision and this Court's precedents is also apparent from the fact that the ruling below creates a deeply troubling gap in the system of private antitrust enforcement in two respects. First, the court of appeals held that petitioner could satisfy the antitrust injury requirement only by alleging that respondent's conduct had resulted in both the elimination of competition and also consumer injury. But that holding imposes a stricter pleading requirement for antitrust injury than for petitioner's *substantive claims* of an unlawful refusal to deal and denial of access to an essential facility. For example, "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). And, "it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports* v. *McQuillan*, 506 U.S. 447, 456 (1993). Not only is consumer harm not an element of these offenses, but this Court in *Brunswick* made quite clear (in the footnote accompanying its statement of the "antitrust injury" rule) that a plaintiff may state a claim at the point consumers are *benefiting* from the defendant's conduct. See 429 U.S. at 489 n.14 ("This does not necessarily mean, as the Court of Appeals feared, that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior – predatory below-cost pricing, for example – may be to *stimulate* price competition. But competitors may be able to prove antitrust injury before they

may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." (emphasis added)). The notion that a plaintiff would face a higher burden of proof in asserting standing than in prevailing on the merits of its case is self-evidently insupportable.

An example illustrates the point. Assume that a plaintiff and a monopolistic defendant compete to sell widgets, which uniformly sell for $5 per unit. The plaintiff alleges that the defendant has engaged in anticompetitive conduct by unreasonably interfering with the plaintiff's access to various inputs necessary to make widgets. As a result, the plaintiff cannot make as many sales while the defendant's sales are increased; consumers, however, are oblivious because they still have access to widgets at $5 per unit. Assuming that the plaintiff has stated the elements of an antitrust violation, no one could possibly doubt that it has suffered "antitrust injury" – *i.e.*, harm arising from the anticompetitive nature of the defendant's conduct – regardless of the impact upon purchasers of the widgets. Under the Sixth Circuit's holding, however, the plaintiff may not sue and the defendant's plainly anticompetitive conduct goes entirely unremedied.

Second, under the court of appeals' holding *no party* would have standing to challenge respondent's anticompetitive refusal to deal and denial of access to essential facilities. As noted above, this Court held in *Kansas* v. *Utilicorp United* that customers of a utility could not bring a suit alleging that a supplier had overcharged their utility. The Court reasoned:

> Like the State of Illinois in *Illinois Brick* [v. *Illinois*, 431 U.S. 720 (1977)], the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* [v. *United Shoe Machinery Corp.*, 392

> U.S. 481 (1968)] and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

497 U.S. at 207.

Given the manifest conflict between the decision below and this Court's precedents, certiorari should be granted.

II. Other Circuits Have Faithfully Applied The Correct Antitrust Injury and Antitrust Standing Inquiries In Circumstances Indistinguishable From This Case.

Certiorari also should be granted because, unlike the Sixth Circuit, other courts of appeals have remained entirely faithful to the "antitrust injury" standard announced by this Court in *Brunswick* and its progeny and furthermore have held that plaintiffs have antitrust standing to bring indistinguishable claims against their rivals. Cases articulating and applying the correct standard could fill volumes of the Federal Reporter.

a. The Third Circuit. In *Schuylkill Energy Resources* v. *Pennsylvania Power & Light Co.*, 113 F.3d 405, *cert. denied*, 522 U.S. 977 (1997), a utility's power supplier alleged that the utility's reduction of its power purchases violated the antitrust laws. The district court dismissed the complaint for failure to state antitrust injury, and the court of appeals affirmed. Antitrust injury, the court held (in direct contrast to the Sixth Circuit in this case), requires that a plaintiff allege "injury to competition *or* consumer welfare." 113 F.3d at 413 n.6 (quotation marks omitted) (emphasis added). The court thus explained that the plaintiff could state antitrust injury by alleging that the utility's conduct "harms competition" by excluding the plaintiff as a "competitor." *Id.* at 415. Indeed, the Third Circuit viewed the far more *critical* question for purposes of antitrust injury to be whether the defendant's conduct reduced competition, explaining that the existence of antitrust injury turned on "whether PP&L unlawfully excluded independent power producers like SER from the relevant

market." *Id.* at 414. But because the plaintiff in *Schuylkill Energy Resources* (in contrast to petitioner in this case) was only a supplier of the utility, and was forbidden by both law and contract from competing with the utility, the Third Circuit held as a matter of law that no claim of "antitrust injury" could be stated. *Id.* at 415; see also *id.* at 419 (Stapleton, J., concurring) ("Without a competitive market, [plaintiff] could not have been PP&L's competitor, and there cannot have been antitrust injury."). In a subsequent decision presenting very similar facts – a utility defendant precluded by state regulation from engaging in competition – the Third Circuit again denied the plaintiff standing but stated categorically: "Had the ability of the utilities to serve various customers in various regions not been subject to approval of the PUC, our standing analysis would be *radically* different." *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 269 (1998) (emphasis added).

Other Third Circuit decisions similarly reject the Sixth Circuit's view that consumer harm is the *sine qua non* of antitrust injury. The plaintiff in *Angelico* v. *Lehigh Valley Hospital, Inc.*, 184 F.3d 268 (CA3 1999), alleged that his competitors – a hospital and competing cardiac surgical groups – had engaged in exclusive dealing and a boycott in an effort to eliminate him as a competitor. The district court acknowledged that the plaintiff had suffered an injury (lost income), but held that the plaintiff lacked standing to sue under the antitrust laws because he had not made a "a showing that his absence from the relevant product and geographic markets injured competition and/or the consumers." 184 F.3d at 273. The Third Circuit reversed, holding that "the injury [the plaintiff suffered], *when shut out of competition* for anticompetitive reasons, is indeed among those the antitrust laws were designed to prevent." *Id.* at 274 (emphasis added). The Third Circuit in *Angelico* specifically identified the district court's error – an error the Sixth Circuit appears to have duplicated in this case – as "incorporating the issue of anticompetitive mar-

ket effect into its standing analysis, confusing antitrust injury with an element of a claim under section 1 of the Sherman Act, which prohibits 'contracts, combinations or conspiracies "in restraint of trade."'" *Id.* at 275 n.2 (citation omitted).

In support of its decision, the Third Circuit in *Angelico* relied on its prior holding in *Brader* v. *Allegheny General Hospital*, 64 F.3d 869 (1995), that "a loss of income" constitutes antitrust injury when "directly related to the illegal activity in which the defendant allegedly engaged: a conspiracy to exclude [the plaintiff] from the relevant market." 64 F.3d at 877, *quoted in Angelico*, 184 F.3d at 275. *Brader* squarely found that the plaintiff had sufficiently pleaded antitrust injury by asserting that the defendants "successfully reduced competition." 64 F.3d at 877. Compare *supra* at 4-5 & nn.1-2 (recounting allegations of petitioner's complaint).[12] Numerous other decisions of the Third Circuit similarly have made plain that an intended victim of a boycott or refusal to deal satisfies the antitrust injury requirement, never imposing anything remotely comparable to the Sixth Circuit's requirement that the defendant's conduct have injured consumers.[13]

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[12] *Angelico* and *Brader* are also instructive because they caution that dismissal on antitrust injury grounds is inappropriate when – as in this case – the plaintiff has not been permitted to develop facts in support of its theory of harm. See *Angelico*, 184 F.3d at 274 ("First, because no discovery was allowed on the issue, we must assume Angelico's allegation that the defendants acted in concert and with an anticompetitive motive, *i.e.*, conspired, is true. Following this assumption, Angelico's harm clearly resulted from the conspiracy that prevented him from competing in the market and thereby earning a living."); *Brader*, 64 F.3d at 876 (rejecting "impatience with the notice pleading embodied in the Federal Rules"). See also *supra* at 15 n.7.

[13] *E.g.*, *Carpet Group Int'l* v. *Oriental Rug Importers Ass'n*, 227 F.3d 62, 78 (CA3 2000) (antitrust injury when "injury to the plaintiffs was the precisely intended consequence of defendants' boy-

b. The Seventh Circuit. In *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (CA7 1980), *cert. denied*, 449 U.S. 1096 (1981), the plaintiff cities, which sought to compete with the defendant utilities in the market for retail power sales, alleged that the defendants had engaged in a variety of acts designed to inhibit competition, such as creating a "price squeeze" and "related exclusionary acts calculated to force the municipalities out of the retail electric business resulting in the conversion of municipal retail customers into retail customers of the utility." 616 F.2d at 978. The Seventh Circuit held that such anticompetitive conduct necessarily caused the cities to suffer antitrust injury because "the municipalities were impaired in their ability to offer competitive rates and service to present and potential customers." *Id.* at 986. Not only did the Seventh Circuit thus find antitrust injury without any allegation of consumer harm, but it also rejected the approach (adopted by the Sixth Circuit in this case) of "consider[ing] each separate aspect of [the defendant's] conduct separately and in a vacuum," which could lead one to "agree with the utility that no one aspect standing alone is illegal." *Id.* Instead, the Seventh Circuit concluded, a court must look to "the mix of the various ingredients of utility behavior in a monopoly broth" to determine if it "produces the unsavory flavor." *Id.*

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cott" (quoting *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris*, 171 F.3d 912, 926 & n.8 (CA3 1999)) (alterations omitted)); *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 485 (CA3 1998) (antitrust injury when plaintiff identified only five customers lost through boycott because injury was "a direct result of the alleged antitrust violation"); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1164 n.14 (CA3 1993) ("Because the private dock companies themselves were direct competitors of the railroads and because they were injured by the conspiracy's goal to preclude them from market entry, no standing problem is posed by their quest for damages."), *cert. denied*, 510 U.S. 1091 (1994).

The Seventh Circuit subsequently held in *Fishman* v. *Estate of Wirtz*, 807 F.2d 520 (1986), that a plaintiff suffered "antitrust injury" when one of its competitors in a bid to secure a basketball franchise withheld from the plaintiff access to a facility – a stadium – necessary to secure the franchise. Citing *Brunswick*, the court explained that "antitrust injury" is simply injury "related to the sorts of concerns that underlie the Sherman Act," a requirement met when the defendant's refusal to provide access to the facility "deprived [the plaintiff] of a fair shot." 807 F.2d at 532-33. In this respect, the court of appeals found particularly instructive this Court's holding in *Otter Tail Power Co.*, *supra*. See generally 807 F.2d at 533-34. And, like the Third Circuit, the Seventh Circuit rejected the approach adopted by the Sixth Circuit in this case. The Seventh Circuit relied on its prior decision in *Mishawaka*, explaining that in that case "there [was] no reason to believe that [the utility's] price squeeze was designed * * * to deprive *consumers* of the benefits of competition in generation and *no reason to think that this was a significant factor in this court's analysis*." *Id.* at 535 (emphasis added). The Court concluded: "The antitrust laws are concerned with the competitive process, and their application does *not* depend in each particular case upon the ultimate demonstrable consumer effect." *Id.* at 536 (emphasis added).

c. The Eleventh Circuit. In *Municipal Utilities Board of Albertville* v. *Alabama Power Co.*, 934 F.2d 1493 (CA11 1991), the plaintiffs and defendants were competitors in the market for retail power service. The district court ruled that the plaintiffs lacked antitrust standing to challenge the defendants' attempts to exclude the plaintiffs from various markets, but the Eleventh Circuit reversed. The court of appeals explained that a plaintiff must simply meet the standard for alleging antitrust injury announced by this Court in *Brunswick*. 934 F.2d at 1499. That standard was plainly met, the Eleventh Circuit held, by the plaintiffs' "alleg[ation] that the defendants deprived them of the opportunity to compete for fu-

ture customers." *Id.* at 1500. "There is a close relationship between the [plaintiffs'] claimed injury and the alleged antitrust violation; the Acts limit the [plaintiffs'] ability to compete for future customers by excluding them from territories where they formerly competed." *Id.* The Eleventh Circuit furthermore rejected the defendants' argument (which mirrors the holding of the Eleventh Circuit in this case) that only consumers have standing to bring such a claim:

> Although the defendants' allegedly anticompetitive conduct would also injure consumers, such conduct would also directly injure the [plaintiffs] as competitors. The [plaintiffs] are therefore an efficient enforcer of the antitrust laws. Because the [plaintiffs] have alleged an antitrust injury and are an efficient enforcer of the antitrust laws, they have standing to challenge the defendants' anticompetitive conduct regardless of where it occurs in Alabama.

Id. at 1500.

To the same effect is *Key Enterprises of Delaware* v. *Venice Hospital*, 919 F.2d 1550 (CA11 1990), where the plaintiff ("VCA") alleged that its competitors had conspired to exclude it from the market for sales of durable medical equipment. The plaintiff specifically alleged that it had suffered competitive harm, but identified as the only impact upon consumers that hospital patients were directed to one supplier rather than another (just as in this case, respondent's anticompetitive practices lead large industrial customers to purchase from it rather than from petitioner[14]). The district court ruled for the

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[14] See, *e.g.*, *supra* at 4 (quoting Compl. ¶ 44(b) (alleging respondent's conduct "depriv[ed] customers of competing low-cost alternatives for electric power")), 8 (quoting Pet. App. 7a ("The plaintiff argues that such contracts not only excluded Indeck from the market but also caused the customers to lose low-cost alternatives to Consumers Energy's product.")).

defendants on the ground that the plaintiff failed to demonstrate consumer injury, but the Eleventh Circuit reversed, holding such an inquiry to be irrelevant. Citing this Court's decisions in *Cargill*, *Atlantic Richfield*, and *Brunswick*, the court of appeals explained that "defendants engaged in a number of anticompetitive acts which, if causally related to VCA's alleged injury, support a finding of antitrust injury." 919 F.2d at 1559. The Eleventh Circuit reasoned:

> VCA claims that defendants' practices have unreasonably restricted competition by channeling patient choice to defendants and by excluding all competing DME vendors' access to Venice Hospital's patients. The antitrust laws were intended to prevent unreasonably exclusionary practices. VCA's injury flows directly from that which makes the defendants' acts unlawful. Appellees claim and the district court agreed that VCA failed to show that the patients as the consumers, suffered any injury. As we discussed above, the channeling of patient choice is sufficient to show injury to consumers. The antitrust laws *do not* require the consumer to suffer some form of monetary damage before a defendant's anticompetitive conduct is actionable.

Id. (emphasis added).

c. Other Courts Of Appeals. Numerous other circuits have squarely held that plaintiffs sufficiently allege antitrust injury by asserting that a rival has engaged in a boycott or refusal to deal. So far as petitioner has been able to determine, every other court to consider the question has refused to apply the exceedingly stringent standard adopted by the Sixth Circuit. Instead, these circuits simply require the plaintiff to allege that the defendant's conduct has reduced competition, not consumer harm. See, *e.g.*, *Primetime 24 Joint Venture* v. *NBC*, 219 F.3d 92, 103 (CA2 2000) (when defendants refused to negotiate with plaintiff to license copyrighted television programming, plaintiff sufficiently alleged antitrust injury

because it "plausibly allege[d] a harm to competition: according to the complaint, appellees' conspiracies both reduced networks' national competition with alternative programming and reduced local stations' competition with alternative distribution systems"); *Doctor's Hosp. of Jefferson, Inc.* v. *Southeast Med. Alliance, Inc.*, 123 F.3d 301, 305-06 (CA5 1997) (competitor had standing, without regard to "a market-wide injury to competition" or harm to consumers, because its "alleged injury flows from the allegedly exclusionary conduct of its competitor East Jefferson and is exactly the kind of anticompetitive effect that East Jefferson sought"); *Amarel* v. *Connell*, 102 F.3d 1494, 1509 (CA9 1996) (reiterating settled Ninth Circuit precedent that "a competitor of an alleged attempted monopolist ha[s] standing where it was either driven out of business or suffered reduced profits because of the alleged anticompetitive acts of the attempted monopolist"); see also *id.* at 1508 (citing Phillip E. Areeda & Herbert Hovenkamp, 2 Antitrust Law ¶ 373d (rev. ed. 1995) ("Standing is clear * * * when the plaintiff alleges that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff * * * so that the defendant could maintain or create a monopoly.") (alteration in original)); *Barber & Ross Co.* v. *Lifetime Doors, Inc.*, 810 F.2d 1276, 1279 (CA4 1987) (plaintiff alleging refusal to deal suffers antitrust injury because "[a] buyer who is injured due to a refusal to deal in furtherance of the seller's anticompetitive scheme has been injured as a direct result of an antitrust violation").

Given the direct conflict between the holding of the Sixth Circuit in this case and precedents of other courts of appeals, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary consideration or the judgment should be summarily reversed.

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April 19, 2001.

APPENDIX

INDECK ENERGY SERVICES, INC., an Illinois corporation, and INDECK-SAGINAW LIMITED PARTNERSHIP,
Plaintiffs-Appellants,

v.

CONSUMERS ENERGY COMPANY, a Michigan corporation, and CMS ENERGY CORPORATION, a Michigan corporation,
Defendants-Appellees.

No. 99-1433

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

October 6, 2000, Filed

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BEFORE: NELSON, BOGGS, and DAUGHTREY, Circuit Judges.

OPINION: PER CURIAM. This appeal arises from an antitrust action against two public utility companies, Consumers Energy Company and its holding company, CMS Energy Corporation. Consumers Energy provides energy for a

substantial portion of lower Michigan. The plaintiffs, Indeck Energy Services and Indeck-Saginaw (collectively, "Indeck"), operate "co-generation systems," which provide energy for large commercial and industrial energy customers. They appeal from the district court's dismissal of CMS Energy for failure to state a claim on which relief could be granted. They also appeal the dismissal of their antitrust and state law claims, alleging that the court erroneously applied the "state action doctrine" exemption from antitrust liability and mistakenly held that Indeck failed to prove an antitrust injury. Because we conclude that the district court ruled correctly on the standing issue, we find it unnecessary to address the question of whether the court properly applied the state action doctrine in this case. Furthermore, we find no error in the dismissal of CMS Energy as a party defendant.

FACTUAL AND PROCEDURAL BACKGROUND

According to its complaint, Indeck had agreed with General Motors in 1994 to develop a co-generation facility at General Motors's Saginaw Steering Division Plant. As a result, Indeck undertook extensive preparations for work on the project. Simultaneously, General Motors also selected Indeck as its "preferred developer" of another co-generation facility at its plant in Flint, Michigan, leading Indeck to begin substantial development efforts on that project as well.

Indeck alleges that the success of its Saginaw and Flint co-generation projects was undermined by Consumers Energy's reluctance to share the public utility's facilities and transmission services. Additionally, Indeck contends that Consumers Energy sabotaged the plaintiff's attempts to service General Motors with co-generated power by insisting on increases in rates for the provision of stand-by electric power to the plants. Finally, Indeck alleges, Consumers Energy negotiated its own supply agreement with General Motors, under which the utility contracted to be the exclusive supplier of power for five to ten years to 19 General Motors facilities, including the Flint plant, with an option to add the Saginaw facility. In order to entice General Motors to include the Saginaw plant in the power agreement, Consumers Energy offered General Motors a "multi-million dollar discount" on

power costs for all other covered facilities, contingent upon inclusion of the Saginaw plant in the contract. Not surprisingly, General Motors agreed to the discounted power costs in exchange for the limited exclusivity deal.

Because of the tremendous increase in the power demand due to its exclusive power-provision agreements with the 20 General Motors facilities and with 17 other large industrial/commercial customers, Consumers Energy was forced to seek additional power from other suppliers. The plaintiff contends that, rather than contract with Indeck or other independent generators, however, Consumers Energy purchased the necessary power only from its own affiliated producer, Midland Co-generation Venture Limited Partnership. Consequently, Indeck asserts, Consumers Energy "succeeded in excluding competition from over 80 percent of the Relevant At Risk Market while at the same time keeping potential supplemental and alternative sources of electrical power out of the market."

Aggrieved by the actions of the defendants, Indeck filed suit in federal district court against Consumers Energy and against CMS Energy, alleging violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, § 3 of the Clayton Act, 15 U.S.C. § 14, and the Michigan law of tortious interference with a prospective economic advantage. The defendants responded by filing motions to dismiss and "for summary disposition and/or to dismiss." The district court granted the motion to dismiss defendant CMS Energy because the complaint failed to state a claim against that defendant upon which relief could be granted. Later, the court also granted judgment to Consumers Energy on the federal causes of action, determining that the utility was exempt from federal antitrust legislation under the state action doctrine and that Indeck had failed to show the requisite antitrust injury. The court dismissed without prejudice Indeck's Michigan state law claim. From these and other related rulings, Indeck now appeals.

DISCUSSION

I. Standing

In granting summary judgment in favor of the defendants, the district court concluded that Indeck's complaint failed to allege the requisite antitrust injury and that the plaintiff therefore lacked standing to prosecute this cause of action. The court determined that no antitrust injury was occasioned when Consumers Energy contracted with customers other than General Motors, when Consumers Energy allegedly showed favoritism to Midland Co-generation Venture, or when Consumers Energy refused to enter into agreements with the plaintiff to purchase excess energy generated by Indeck.

Under Sixth Circuit case law, "it is not enough for the plaintiff to claim economic injury: 'Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *Valley Prods. Co., Inc. v. Landmark, A Div. of Hospitality Franchise Sys., Inc.*, 128 F.3d 398, 402 (6th Cir. 1997) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). Such a heightened standard is required because the relevant antitrust laws "were enacted for 'the protection of competition not competitors.'" *Brunswick Corp.*, 429 U.S. at 488 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)).

By emphasizing the importance of establishing "antitrust injury," courts ensure "that antitrust litigants use the laws to prevent anti-competitive action and make[] certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense." *Hypoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991). Otherwise, "routine disputes between business competitors would be elevated to the status of an antitrust action, thereby trivializing the Act because of its too ready availability." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993).

To assist courts in fulfilling their responsibilities of ensuring that antitrust laws are not "trivialized," the Supreme Court has articulated certain factors to be analyzed in determining whether a plaintiff has established antitrust standing. *See Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). Those factors include:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Southaven Land Co., Inc. v. Malone & Hyde, Inc., 715 F.2d 1079, 1085 (6th Cir. 1983). All five factors must be balanced, however, with no one factor being determinative. *See Peck v. General Motors Corp.*, 894 F.2d 844, 846 (6th Cir. 1990). Furthermore, as noted by this court in *Valley Products*, "the Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of antitrust laws, flows directly from conduct that is not itself an antitrust violation." 128 F.3d at 403.

In this case, an examination of the antitrust standing factors leads to the inescapable conclusion that the district court appropriately dismissed Indeck's cause of action against the defendants.[1] Significantly, the only harm allegedly suffered by Indeck was in the company's capacity as a competitor in

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[1] An identical conclusion would be reached whether this issue is analyzed under Rule 56 or under Rule 12(b)(6). Hence, we need not address Indeck's contention that the district court improperly applied summary judgment analysis to a Rule 12 proceeding.

the marketplace, not as a defender of marketplace competition. Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative. The record in this appeal presents no indication that competition itself was harmed by any act of the defendants. Consequently, the antitrust damages alleged by Indeck are too indirect and speculative to justify assertion of federal antitrust jurisdiction over this matter.

A. Consumers Energy's Contract With General Motors-Saginaw Plant

Indeck asserts that Consumers Energy violated antitrust laws by negotiating a power agreement with the General Motors-Saginaw plant after officials from that factory had discussed with Indeck the possibility of having the plaintiff provide co-generated power for the facility. Consumers Energy, however, did not cause antitrust injury to Indeck by luring General Motors-Saginaw into its fold. Instead, General Motors itself decided not to pursue further its negotiations with the plaintiff, but rather to take advantage of the discounted rates offered by Consumers Energy. No allegation in the complaint indicates in any manner whatsoever how General Motors itself was harmed or how other customers in the energy market suffered by agreeing to a limited power provision agreement with a lower bidder for such energy generation. Moreover, as the direct victim of the alleged antitrust violation in this regard, General Motors-Saginaw could prosecute its own cause of action should it deem the actions of Consumers Energy inappropriate. Consequently, a balancing of the factors to be considered in an antitrust standing case tilts in favor of a decision that no antitrust injury can be proved, as a matter of law, concerning the Consumers Energy agreement with General Motors-Saginaw.

B. Consumers Energy's Contracts With Other Large Customers

Indeck also insists that contracts entered into by Consumers Energy with 17 other large power consumers in eastern Michigan other than General Motors-Saginaw violated anti-

trust laws by effectively preempting 87% of the co-generation market. The plaintiff argues that such contracts not only excluded Indeck from the market but also caused the customers to lose low-cost alternatives to Consumers Energy's product.

Indeck does not contend that it actually had agreements with any of the 17 power users referenced in its claim or that it could have served as a true lower-cost alternative to Consumers Energy. As a result, any claim of injury to the plaintiff from the defendants' actions is speculative at best. Moreover, even if Indeck were able to establish the preemption from the relevant market that it asserts, it has failed to allege how such acts have injured competition, especially in light of the discounted rates offered to the customers, in light of the fact that the exclusive contracts were of limited duration, and in light of the fact that the customers were free to seek other power generators at the conclusion of the contracts. Once again, a balancing of the relevant factors to establish antitrust injury leads to the conclusion that the district court properly and summarily granted judgment as a matter of law on this portion of Indeck's claims.

C. Favoritism By Consumers Energy For Midland Co-generation Venture

Indeck further contends that the anti-competitive nature of Consumers Energy's actions is shown by the defendants' selection of the affiliated Midland Co-generation Venture as the sole co-generator for its power provision agreements with high-use customers. The plaintiff argues that the selection of Midland effectively eliminated Indeck and all other competitors from the co-generation market in eastern Michigan.

The mere allegation of such a selection, however, does not militate against the grant of a motion to dismiss the plaintiff's claims. Absent some indication that a less-than-arm's-length transaction destroyed or damaged the competitive environment in power generation, the fact that Consumers Energy selected a co-generation partner other than the plaintiff does not amount to the injury necessary to establish antitrust standing. Theoretically, any selection of a competitor in the marketplace will cause some economic harm to the entities not chosen for the provision of goods or services. In a situa-

tion such as the one presented in this case, however, where the power provision agreements are of limited duration, unfair pricing or unfair treatment of a customer will lead that consumer to investigate alternate vendors in future contractual dealings. Once again, Indeck has alleged only injury to itself in not being selected by Consumers Energy to provide co-generation services, not injury to the customers who voluntarily chose to contract with Consumers Energy in a free exchange of payment and benefit. Such an injury to a competitor, rather than to competition, is not the type of injury to which the antitrust laws address themselves. Absent some indication that it could offer a superior product or a lower cost, Indeck has thus failed to allege the requisite antitrust injury on this allegation as well.

D. "Refusal" Of Consumers Energy To Buy Excess Power From Plaintiff

Indeck also attempts to establish its standing and antitrust injury by alleging that Consumers Energy offered to independent co-generators "unreasonably low payments for excess power" that those co-generators produced and sought to sell to Consumers Energy to alleviate the defendant's insufficient capacity. The plaintiff asserts that such action by Consumers Energy placed Indeck "in an exclusionary 'price-cost' squeeze" that hampered competition for customers. Furthermore, Indeck claims that Consumers Energy "exploited this situation by purchasing power for these captive customers from [its own affiliated power producer]."

What Indeck fails to allege, however, is that Consumers Energy's desire to "buy low" meant that all other unsuccessful bidders for Consumers Energy's business were driven out of the market and that thereafter Consumers Energy paid above-market prices for excess power. Had the plaintiff asserted such claims in its complaint, Indeck might have alleged sufficient facts to defeat the defendant's motion to dismiss. As it is, the complaint in this matter gives no indication that Consumers Energy's tactics caused any harm to competition in general. Indeck and other independent power producers have no statutory right to compete in the economic marketplace on their own terms and in such a manner as to accumu-

late expected profits. As determined by the district court, therefore, allegations that companies were unable to receive prices for excess power that they felt were "reasonable" are insufficient to justify a finding that Indeck has standing to prosecute this claim against Consumers Energy or that the plaintiff suffered antitrust injury. In the absence of concrete allegations of harm to the competitive nature of energy provision, the district court thus was correct in granting the defendant's motion to dismiss the claims against it as a matter of law.

II. Dismissal Of Claims Against CMS Energy

Indeck's antitrust complaint in this matter listed as defendants not only Consumers Energy, but also Consumers Energy's "parent and holding company," CMS Energy. Prior to ruling upon Consumers Energy's motion to dismiss based upon state action immunity and lack of standing, however, the district court dismissed CMS Energy as a defendant on Indeck's claims of violations of §§ 1 and 2 of the Sherman Act, of § 3 of the Clayton Act, and of the Michigan law against tortious interference with prospective business advantage. On appeal, Indeck now asserts that the district court's order dismissing CMS Energy was improper. As to the federal claims, we find it unnecessary to treat the dismissal of CMS Energy at length, given our determination that the plaintiff has failed to establish standing in this case.

That leaves, however, the plaintiff's claim that the district court erred in dismissing its state law claim of tortious interference with a prospective economic advantage against both Consumers Energy and CMS Energy. While the state law claim asserted against Consumers Energy was dismissed without prejudice, the dismissal of the state law claim against CMS Energy did not contain such a qualification and was thus dismissed with prejudice. On appeal, however, the plaintiff makes no specific arguments challenging the ruling regarding dismissal of the state claim against CMS Energy. Because even "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived," any challenge to the dismissal of the state claims is not properly before this court. *See United*

States v. Layne, 192 F.3d 556, 566-67 (6th Cir. 1999), *cert. denied*, 529 U.S. 1029, 146 L. Ed. 2d 330, 120 S. Ct. 1443 (2000) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997)).

CONCLUSION

For the reasons set out above, we find no error in connection with the district court's decision to dismiss the claims against Consumers Energy, because Indeck failed to establish antitrust injury and standing. Furthermore, that same failure of the plaintiff to meet its standing threshold justifies the dismissal of the federal claims against CMS Energy as well. As a result, we AFFIRM the judgment of the district court dismissing all federal claims against the defendants, as well as the district court's dismissal of the state law claim against CMS Energy with prejudice and the dismissal of the state law claim against Consumers Energy without prejudice. In light of these holdings, we pretermit discussion of all other claims of error raised on appeal by Indeck.

INDECK ENERGY SERVICES, INC., and INDECK LIMITED PARTNERSHIP,

Plaintiffs,

v.

CONSUMERS ENERGY COMPANY, and CMS ENERGY CORPORATION,

Defendants.

Case No: 97-CV-10366-BC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

March 31, 1999, Decided

March 31, 1999, Filed

ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING WITHOUT PREJUDICE PLAINTIFFS' STATE LAW CLAIM

I. Introduction

This matter is before the court on "Defendants' Motion for Summary Disposition and/or to Dismiss," filed November 26, 1997. Although the motion was filed by both defendants, defendant CMS Energy Corporation was dismissed in an order dated September 18, 1998, and the instant motion primarily concerns only defendant Consumers Energy Company ("Consumers"). Therefore, the court will treat the motion as being brought only by Consumers.

Plaintiffs ("Indeck") filed a timely response on February 18, 1998, after the court granted an extension for discovery and the taking of a deposition. Consumers' reply was timely received and filed April 1, 1998. The Attorney General for the State of Michigan was granted leave to file an amicus curiae brief. Oral argument was heard on April 22, 1998.[1]

II. Standard

Federal Rule of Civil Procedure 12 provides that if a party moves to dismiss for failure to state a claim upon which relief can be granted and presents matters outside the pleading, which are not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Fed. R. Civ. P. 12(b). Because both parties presented materials outside the pleadings, the court will treat the instant motion as a motion for summary judgment.

Under Rule 56, summary judgment is proper when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Where the moving party has carried its burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record construed favorably to the non-moving party, do not raise a genuine issue of material fact for trial, entry of summary judgment is appropriate." *Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106

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[1] The parties have also submitted a number of documents and correspondence in addition to the briefs permitted by local rule. E.D. Mich. LR 7.1(d)(1). Specifically, Indeck filed a motion for leave to file supplemental authority on March 2, 1998; Indeck then filed a motion for leave to file surreply memorandum on April 1, 1998; Consumers responded to the surreply on April 8, 1998; Consumers sent a letter on August 27, 1998 which Indeck responded to on September 4, 1998; most recently, Indeck sent a letter dated February 17, 1999, to which Consumers responded on February 23, 1999. The court has considered each of these additional submissions.

S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Summary judgment is not appropriate when "the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The existence of some factual dispute does not defeat a properly supported motion for summary judgment; the disputed factual issue must be material.

The burden placed upon the movant for summary judgment is to show that the nonmoving party has failed to establish an essential element of its case upon which the nonmoving party would bear the ultimate burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322. Nevertheless, the moving party need not support its motion with affidavits or other similar materials "negating" the opponent's claim. *Id.* at 323. Once the moving party meets this burden, the burden passes to the nonmoving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element necessary to its case with respect to which it bears the burden of proof. *Id.* The nonmoving party must show that sufficient evidence exists for a jury to return a verdict in its favor, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989), *i.e.*, that there is doubt as to the material facts and that the record, taken as a whole, does not lead to a judgment for the movant. *Id.* at 1476. The nonmoving party must present affirmative evidence on critical issues. *Id.* at 1477.

III. Background

Consumers provides electric and gas utilities to the public. Indeck is an independent power production company in the business of developing cogeneration facilities. (Compl. P 1.) Indeck argues that Consumers engaged in three basic types of illegal and anticompetitive activity. These allegations make up the challenged activity at issue in this case.

First, Indeck alleges that Consumers implemented an illegal and anticompetitive scheme to lock up most of the "at-risk" industrial/commercial customers with long-term exclusive dealing contracts. (*Id.* P 2.) Specifically, in 1994, Indeck and General Motors ("GM") entered into a cogeneration development contract for the Saginaw Project. (*Id.* P 24.) Indeck understood that GM had also selected it to supply co-

generation for the Flint Project. (*Id.* P 26.) However, Consumers entered into exclusive dealing contracts with GM for nineteen facilities for a term of five to ten years. (*Id.* PP 34-36.) GM exercised its option to add the Saginaw facility as an exclusive user under the existing contracts with Consumers. (*Id.* P 37.) In addition, Consumers signed long-term exclusive dealings contracts with 17 other "at-risk" industrial/commercial customers. (*Id.* PP 39-40.) Indeck claims this locked up over 80% of the "at-risk" customers with exclusive dealing contracts. (Pl. Br. at 4.) Indeck also contends that the lower rates offered by Consumers were conditioned on the customer dealing only with Consumers, to the exclusion of Indeck.

Second, Indeck claims that Consumers stalled and frustrated the efforts of Indeck and other independent power producers to enter the market by denying them meaningful access to essential facilities and resources available only from Consumers. (Compl. P 2.) Indeck claims that Consumers refused to negotiate in good faith a standby power agreement, refused to enter into a power purchase agreement, and denied Indeck meaningful access to interconnect to Consumers' transmission systems. (Pl. Br. at 3-4.)

Third, Indeck alleges that Consumers favored its own affiliated power producer, Midland Cogeneration Venture ("MCV"), over other true independent providers. Indeck argues that Consumers "put itself in a position where it had insufficient capacity by 1996 to meet the projected needs of its captive residential and small business customers" and then exploited the situation by favoring MCV. (Compl. P 43.) Indeck acknowledges that other references to Consumers providing favoritism for MCV are included in the complaint only for historical background, to help show motive and to demonstrate resulting market injury. (Pl. Br. at 34, 37.)

IV. Discussion

Indeck's complaint contains five counts against Consumers. Counts I and II allege a violation of section two of the Sherman Act through monopolization or attempted monopolization. Count III alleges a violation of section three of the Clayton Act. Count IV alleges a violation of section one of

the Sherman Act. Finally, count V alleges tortious interference with prospective economic advantage.

The central defense asserted by Consumers to each of the four antitrust claims is the state-action doctrine. If the state-action doctrine applies, Consumers' alleged anticompetitive conduct is permitted so long as it is authorized and supervised by state officials. The application of the state-action doctrine is a question of law for the court to decide. *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1499 (10th Cir.), *cert. denied*, 522 U.S. 948, 118 S. Ct. 365, 139 L. Ed. 2d 284 (1997); *FTC v. Hospital Bd. of Dir.*, 38 F.3d 1184, 1187 (11th Cir.), *reh'g denied*, 50 F.3d 1040 (1995); *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir.), *cert. denied*, 459 U.S. 1022, 103 S. Ct. 388, 74 L. Ed. 2d 519 (1982). Thus, the procedural posture of the case does not control the court's analysis and "findings" are appropriate. In other words, presented with a question of law, the court is not faced with material issues of fact which would prevent a dispositive ruling. *See, e.g., FTC v. Hospital Bd. of Dir.*, 1994 U.S. Dist. LEXIS 19770, 1994 WL 362226 (M.D. Fla. 1994). Consumers also argues that certain claims are barred by the statute of limitation, lack of standing, lack of antitrust injury, and the failure to provide support for the state law claim.

A. State-Action Doctrine

The Supreme Court first enunciated the state-action doctrine in *Parker v. Brown*, where it held that federal antitrust laws are not intended to reach state-regulated anticompetitive activities. 317 U.S. 341, 350-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943). The state-action immunity doctrine permits state regulatory programs to supercede federal antitrust laws based on principles of federalism. *Id.* at 350-52. "Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable." *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 389, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) (citing *Hoover v. Ronwin*, 466 U.S. 558, 568-569, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); *Bates v. State Bar of Arizona*, 433 U.S. 350, 360, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)). However, the state-action doctrine is designed to shelter "only the particular anti-

competitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988).

The Supreme Court has established a two-prong test for determining when state regulation of private parties is shielded from federal antitrust laws. First, "the anticompetitive behavior must be "one clearly articulated and affirmatively expressed as state policy." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980); *see also Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324, 329, *modified*, 774 F.2d 162 (6th Cir. 1985). Thus, "only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature or a State Supreme Court" is the first prong satisfied. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985) (internal citations omitted). Even the extensive regulation of an industry is not enough where the actual activity is not regulated. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976). However, a State's clearly articulated intent to adopt a permissive policy is sufficient, and no compulsion is required. *Southern Motor Carriers*, 471 U.S. at 60-61. Moreover,

> [a] private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific detailed legislative authorization' for its challenged conduct. As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied.

Id. at 64 (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.))

Second, when the actor is a private party, as opposed to a municipality, the anticompetitive behavior must be actively supervised. *Midcal*, 445 U.S. at 105. Thus, "while a State may not confer antitrust immunity on private persons by fiat,

it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992). Active supervision requires "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*

1. State Policy

Consumers argues that the clearly articulated policy of Michigan to displace unfettered competition with regulation can be found in M.C.L.A. § 460.6 which authorizes the Michigan Public Service Commission ("MPSC") to regulate services and conditions of service. Section 460.6 provides that:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including electric light and power companies, whether private, corporate, or cooperative. . . .

Consumers also relies on M.C.L.A. § 460.552 for the proposition that all rates which Consumers charges its retail customers are subject to approval by the MPSC. Section 460.552 provides:

> The Michigan public utilities commission, hereinafter referred to as "the commission" shall have control and supervision of the business of transmitting and supplying electricity as mentioned in the first section of this

> act and no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing the affirmative action of the commission approving said rate or charge.

Consumers claims that since it cannot charge a rate which has not been approved, the legislature has enacted a clear policy to displace competition with regulation. (Def. Br. at 44.) Consumers concedes that Michigan does not compel Consumers to enter into discount contracts with customers; however, Consumers alleges that such a mandate is not required since Michigan has clearly articulated a permissive policy. (*Id.* at 45-46; Def. Reply Br. at 11; citing *Southern Motor Carriers*, 471 U.S. at 55-56 & 61.)

To the contrary, Indeck asserts that no Michigan statute or Supreme Court decision clearly articulates a state policy to displace competition or immunize otherwise anticompetitive behavior with MPSC regulation. (Pl. Br. at 8.) Indeck argues that the MPSC has "clearly articulated its view expressly favoring competition from cogenerators and disapproving Consumers' efforts to thwart competition by cogenerators." (*Id.* at 19; citing Aff. Mikelonis, Ex. 26 at 4-6.)

The MPSC is empowered to and does regulate competition among electricity suppliers. *See In re Retail Wheeling Tariffs*, 227 Mich. App. 442, 451, 575 N.W.2d 808 (1998). The legislature has given the MPSC "control and supervision of the business of transmitting and supplying electricity." M.C.L.A. § 460.552; *see also Retail Wheeling*, 227 Mich. App. at 451. In addition, the MPSC has the authority to regulate "services, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." M.C.L.A. § 460.6; *see also Retail Wheeling*, 227 Mich. App. at 451.

Additionally, the Governor of Michigan has encouraged reform of the electric utility industry in Michigan and encouraged the MPSC to "promote competition within reasonably established time frames." (Aff. Mikelonis, Ex. 54.) The State's permissive policy is reflected in the MPSC investiga-

tion of retail competition and approval of an expanded role for special contracts to meet the increasing customer demand. (*Id.*, Ex. 51 at 11 [MPSC Nov. 14, 1996 Order].) Recognizing the reform taking place within the electric utility as the new policy of competition is implemented, the MPSC stated that "movement to fully open energy markets should not, and cannot, be instantaneous. Numerous dangers, both known and unanticipated, arise when an industry changes from being highly regulated to more market-driven." (*Id.*. at 76-77.) The MPSC has articulated in its orders that open competition is the goal which will be reached slowly and pursuant to regulation. For example, the MPSC stated in granting the settlement concerning Rate DA[2] and individual contract service that it was "a measured first step in the process of redefining regulation to meet the evolving realities of the electric industry." (*Id.* at 75.)

Exclusive contracts with major electrical users, like GM, are one of the many instruments Michigan is using to make a smooth transition to an open market. (*Id.* at 116-117; Aff. Mikelonis, P 57.) Thus, the GM contract of central focus in this case is a "logical and necessary outcome" of the State's decision to slowly convert to an open utility market over a designated period of time. *See Riverview*, 769 F.2d at 329. The record shows that Michigan has clearly articulated a policy to displace unfettered competition and replace it with a regulatory system that will phase in competition and transition the electrical utility industry to an open market through regulated rates and regulated individual contracts. The first prong of the state-action immunity doctrine has been established.

2. Active Supervision

Consumers argues that the second prong of "active supervision" is established by the fact that the contracts at issue must be filed with and approved by the MPSC. (Def. Br. at 46.) Consumers relies on the affidavit of Mikelonis, paragraphs 50-65, to support the proposition that the MPSC has

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[2] "Rate DA" is a direct access rate established by the MPSC in November 1996.

exercised independent judgment and control over the rates charged and, thus, has played a substantial role in determining the specifics of economic policy. (*Id.* at 51.)

Indeck counters that the MPSC allowed the challenged contracts to go into effect ex parte without notice, hearing, or evidence. (Pl. Br. at 25.) Indeck claims this is indicative of agency rubber-stamping and private discretionary action which the Supreme Court found objectionable in *Midcal* and Ticor. (*Id.*) In addition, Indeck argues that several of the MPSC orders that Consumers relies upon were filed before the challenged contracts existed, thus the MPSC cannot have addressed the anticompetitive practices of Consumers by those rulings. (*Id.* at 23.)

The MPSC must approve all rates, charges and terms of service before electricity can be transmitted or supplied. M.C.L.A. 460.552. As the volume of exhibits submitted in this case illustrate, the MPSC independently reviews and approves, modifies or denies proposed contracts. (*See, e.g.*, Aff. Mikelonis, P 56, Table D). As an example, the MPSC approved the two-part program achieved in settlement stating that it presents "a reasoned and measured transition to an open market." (Aff. Mikelonis, Ex. 51 at 75.) The MPSC explained as follows:

> the combination of Rate DA and Consumers' individual contract service immediately exposes up to 650 MW of the utility's load to market forces. Through use of the two-part program, many of Consumers' most price-sensitive customers will be free either to receive discounted rates from the utility or to obtain energy from third-party suppliers. This should significantly benefit the participating customers (by increasing their national and international competitiveness) and the state's economy (by promoting the retention and creation of jobs). Moreover, by allowing Consumers to compete with other generators, the proposed program may benefit other utility customers by reducing the risk that the utility's largest (and, in many cases, highest load factor) customers will leave the system. This part of the proposed settlement thus presents a measured first step in

> the process of redefining regulation to meet the evolving realities of the electric industry, as well as the needs of both the utility and its customers.

(*Id.*) (emphasis added.) Furthermore, the MPSC concluded that:

> Consumers' need to protect both itself and its captive, full service customers from the loss of the utility's largest customers still exists. . . . changes in the electric utility industry (including, but not limited to, those arising from the FERC's push toward open access at the wholesale level and from the Jobs Commission report's recommendations regarding the need for more customer choice at the retail level) appear to have increased this risk significantly. . . Approving implementation of the proposed individual contract service, and thus allowing qualifying retail customers to assess the benefits of this program in comparison with those of Rate DA, furthers the goal of moving toward competition, while protecting the utility and remaining customers from the risks of immediate, large-scale competition.

(*Id.* at 116-17.) (emphasis added.) The underlined language illustrates the active and determined role the MPSC is taking in regulating the phasing in of limited competition. The MPSC did not accept the negotiated agreement in total. It modified several aspects of the settlement including rejection of a rate moratorium, adjustment of the direct access program, rejection of a rebuttable presumption for recovery of rate discounts, and revision of depreciation practices. (*Id.* at 13.) Thus, the allegation that the MPSC acts as a mere rubber stamp and exercises no independent judgment is not borne out. (*See* Pl. Br. at 25; *c.f.* Ticor, 504 U.S. at 637-38.)

The MPSC approved the entire contract Consumers signed with GM, not just the rate provided to GM. (Aff. Mikelonis, Ex. 50 at 6 [MPSC Oct. 25, 1995 Order U-10961].) Moreover, the MPSC confirmed its decision to approve the contract upon denying a motion for reconsideration, and specifically rejected the argument that the contract with

GM was anti-competitive. (Aff. Mikelonis, Ex. 50 at 6 [MPSC March 11, 1996 Order Denying Reh'g].)

The evidence submitted establishes that Michigan, through the MPSC, actively supervises independent contracts and the introduction of competition among electrical providers. The second prong to the state-action immunity doctrine has been established.

The application of the state-action doctrine is one of law for the court to decide. Having concluded that both prongs of the state-action doctrine are satisfied, the court finds that Michigan regulates the anticompetitive activities alleged in the complaint such that no federal antitrust laws have been violated. *Midcal*, 445 U.S. at 105. As a result, Consumers is entitled to judgment as a matter of law with respect to counts I, II, III and IV of the complaint.

B. Standing and Antitrust Injury

Consumers claims that Indeck lacks standing to complain about and has failed to allege an antitrust injury with respect to "seventeen other customers" with whom Consumers has contracted, favoritism of MCV and refusal to enter into capacity purchase agreements with Indeck affiliates. (Def. Br. at 52.) Consumers argues that it is not illegal to either provide discount contracts to customers or protect its business interests. (*Id.* at 54.) Indeck is not a competitor of Consumers with respect to these activities and Indeck did not have a cogeneration proposal with any of the seventeen other customers, according to Consumers. Thus, Consumers asserts that no antitrust injury has been suffered by Indeck. Consumers argues that the claims set forth in paragraphs 40-43 of the complaint should therefore be dismissed under Rule 12(b)(6) as too speculative to constitute a cause of action. (*Id.*) Consumers also asserts that Indeck should be limited to alleging antitrust injuries concerning GM-Saginaw and precluded from asserting alleged antitrust violations with respect to non-GM discount contracts, the MCV, or other cogeneration projects. (*Id.* at 55.)

Indeck argues that it was seeking to compete with Consumers to supply electric power to GM at Saginaw and Flint and other independent power producers were similarly at-

tempting to compete with Consumers for power sales at other "at risk" customers. (Pl. Br. at 30-31.) Indeck claims that Consumers entered into exclusive dealing discount contracts with seventeen other customers in order to "forestall and exclude competition and deter the entry of competing electrical capacity." (Comp. PP 40-41.) Indeck argues that Consumers' success in "locking up" the "at-risk customer" prevented these utility customers from taking preparatory steps toward developing independent power projects. (*Id.* P 41.) In addition, Indeck claims that Consumers simultaneously refused to provide a standby power contract, charged excessive fees, and offered low payments for excess power in order to squeeze Indeck out of the competitive market. (*Id.* P 42.) As a consequence, Indeck asserts that: (1) competitors, such as itself, have been removed as an alternative source of power; (2) efficient new capacity has been deterred from entering the market; (3) customers have lost competing low-cost alternatives for electric power; (4) Consumers has been able to wrongfully steer their power purchases to MCV which is more expensive. (Pl. Br. at 31.)

An antitrust injury must be proven in order to state a claim for antitrust violation. *Valley Products v. Landmark, Div. of Hosp. Franchise*, 128 F.3d 398, 402 (6th Cir. 1997) (antitrust injury is a necessary component of antitrust standing). An "antitrust injury" is an injury

> of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). An antitrust plaintiff

> must show (1) that the alleged violation tends to reduce competition in some market and (2) that the plaintiff's injury would result from a decrease in that competition rather than from some other consequence of the defendant's action.

Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989). Plaintiff must show injury to competition and not just to itself as a competitor. *Brunswick*, 429 U.S. at 488; *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 825 (6th Cir. 1982). The Sixth Circuit "has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation." *Valley Products*, 128 F.3d at 402.

Indeck might have been injured when Consumers entered into exclusive discount contracts with GM-Saginaw and other customers but Indeck has not shown how discount contracts with large customers destroy or injure competition. In addition, Indeck has not provided evidence to support the allegations that Consumers favored MCV or denied access to essential facilities, much less that such activities constitute an injury to competition. There has been no showing that competition within the electric utility industry has been reduced by Consumers' alleged actions.

Moreover, Indeck has failed to show that it was injured as a result of reduction in competition. Indeck's loss stems from GM-Saginaw contracting exclusively with Consumers. However, if GM had not chosen to contract with Consumers, GM would have contracted with another electric supplier which may or may not have been Indeck. Thus, the loss complained of could have been suffered whether or not Consumers contracted with GM. *See Valley Products*, 128 F.3d at 404. Where Indeck would have suffered the same injury without regard to the allegedly anticompetitive acts of Consumers, Indeck has not suffered an anticompetitive injury as a matter of law. *Valley Products*, 128 F.3d at 403-04; *Hodges v. WSM, Inc.*, 26 F.3d 36, 38 (6th Cir. 1994). Indeck must show that the illegal antitrust conduct was a necessary predicate to their injury. *Hodges*, 26 F.3d at 39. Therefore, even if Consumers' contract with GM violated the antitrust laws, Consumers could have received GM's business lawfully. The "necessary predicate" test is not satisfied under the circumstances presented. *See Hodges*, 26 F.3d at 39.

The court finds that because Indeck has not succeeded in demonstrating an antitrust injury, Indeck does not have standing to bring an antitrust claim. As such, counts I, II, III and IV are subject to summary judgment.

C. Statute of Limitations

Consumers asserts a general claim of a statutory bar based on 15 U.S.C. § 15(b) which provides a four-year time period in which to bring "any action to enforce any cause of action under section 15, 15a, or 15c." (Def. Br. at 28.) Consumers suggests that the court should dismiss paragraphs 15, 19, 20, 21, and 22 of the complaint "insofar as they relate to alleged wrongful acts prior to October 10, 1993." (Def. Reply Br. at 2.)

Indeck's response indicates that paragraphs 19-23 of the complaint relate to historical conduct and provide the background for Consumers' motivation in its anticompetitive conduct. (Pl. Br. at 36-37.) Indeck affirms, however, that it alleges favoritism for MCV over other independent cogenerators in different portions of the complaint. (*Id.* at 37.) Given Indeck's concession that the complaint provides mere historical conduct outside of the time limit for actionable conduct and the court's application of the state-action doctrine in Consumers favor, the court finds that the statute of limitations defense is moot and needs no ruling by the court.

D. State Law Claim

Consumers asserts that Indeck's state law tort claim should be dismissed because there was no per se wrongful act. (Def. Br. at 58-62.) Indeck argues that Consumers violated federal antitrust laws which establish a plainly illegal act. The court, however, has found no such violation.

In the alternative, Consumers requests that the court abstain from exercising jurisdiction over the state law tort claim. (*Id.* at 56.) No discovery has been conducted on this issue since discovery was stayed pending the deposition of Mikelonis and the resolution of dispositive motions. (Pl. Br. at 39 n.40.) Given the ruling today, the court will dismiss without prejudice Indeck's state law claim of tortious interference with prospective economic advantage.

VI. Conclusion

Accordingly, IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' state law claim is DISMISSED WITHOUT PREJUDICE.

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

March 31, 1999

JUDGMENT

In accordance with the Order Granting Defendants' Motion for Summary Judgment and Dismissing Without Prejudice Plaintiffs' State Law Claim entered this date,

Judgment is hereby granted in favor of defendants and against plaintiffs.

March 31, 1999

FILED
March 31, 1999
LEONARD GREEN, Clerk

INDECK ENERGY SERVICES, INC.,
AN ILLINOIS CORPORATION, ET AL.,
Plaintiffs-Appellants,

v.

CONSUMERS ENERGY CO., A MICHIGAN
CORPORATION, ET AL.,
Defendants-Appellees.

No. 99-1433

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEFORE: NELSON, BOGGS, and DAUGHTREY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion of rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

INDECK ENERGY SERVICES, INC., and INDECK LIMITED PARTNERSHIP,

Plaintiffs,

v.

CONSUMERS ENERGY COMPANY, and CMS ENERGY CORPORATION,

Defendants.

Case No. 97-CV-10366-BC

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

September 17, 1998, Decided

September 18, 1998, Filed

ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING DEFENDANT CMS ENERGY'S MOTION TO DISMISS

I. Introduction

This matter is before the Court on defendant CMS Energy Corporation's ("CMS") motion for dismissal, filed November 21, 1997. A response brief was timely filed on February 13, 1998, and a reply was filed March 13, 1998.[2] Oral

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[2] The court granted several extensions to both parties and allowed time for limited discovery after the motion was filed which extended the dates for response and reply briefs.

argument was heard on April 8, 1998. The court finds that the matter is ripe for disposition.

II. Standard

The standard to be applied in deciding a motion to dismiss is as follows:

> [t]his Court must construe the complaint in the light most favorable to the plaintiffs, accept all factual allegations as true, and determine whether the plaintiffs undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give 'fair notice of what plaintiff's claim is and the grounds upon which it rests.' A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. 'In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.'

In Re DeLorean Motor Co., 911 F.2d 1236, 1240 (6th Cir. 1993).(internal citations omitted) (emphasis in original).

III. Background[3]

Plaintiffs, Indeck Energy Services, Inc. and Indeck Limited Partnership ("Indeck"), comprise an independent power production company in the business of developing cogeneration power facilities and selling electricity and other energy forms which it produces. (Comp., ¶ 1). CMS is the parent and holding company defendant Consumers Energy Company ("Consumers").[4] (*Id.*, ¶ 8). Indeck alleges that CMS and Consumers have implemented an anticompetitive scheme to prevent Indeck from successfully competing with them for customers within the relevant at-risk market. (*Id.*, ¶¶ 2-4, 18).

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[3] For the sake of clarity and ease of discussion, the parties will be referred to by name throughout the opinion.

[4] Consumers is a public utility selling electricity and natural gas to retail customers in Michigan. (*Id.*, ¶ 7).

Indeck has sued CMS on five counts: (1) monopolization under section 2 of the Sherman Act; (2) attempted monopolization under section 2 of the Sherman Act; (3) illegal monopolization in violation of section 3 of the Clayton Act; (4) illegal exclusive dealings under section 1 of the Sherman Act; and (5) tortious interference with a business expectancy.[5]

CMS asserts in its motion that Indeck has failed to state a claim upon which relief can be granted, thus the claims against it should be dismissed. Fed. R. Civ. P. 12(b)(6). CMS's position is centered on the assertion that a parent company and its wholly owned subsidiary cannot conspire with one another for purposes of establishing conspiracy under § 1 and § 2 of the Sherman Act. (Def. Br. at 1). In addition, CMS claims that no violation of § 3 of the Clayton Act has been alleged since Indeck does not accuse CMS of entering into exclusive dealings contracts. Finally, CMS argues that Indeck has failed to allege any unlawful conduct, a central requirement of a tortious interference claim.

IV. Discussion

The Sherman Act distinguishes between concerted and independent action. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L.Ed.2d 628, 640-41 (1984). Concerted activity by separate entities is governed by § 1 and the conduct of a single firm is governed by § 2. *Id.* "Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2" because "concerted activity inherently is fraught with anticompetitive risk." *Id.* at 768.

A. § 1 Sherman Act

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[5] The court addresses the counts of the complaint out of numerical order, electing to deal with each issue as it is organized in the U.S. Code verses the manner in which they are set forth in plaintiff's complaint. Thus, the court begins with section one of the Sherman Act which is Count IV, followed by section two of the Sherman Act which are counts I and II, followed by the Clayton Act which is Count III, and finally the claim of tortious interference found in Count V.

Section 1 of the Sherman Act declares any unreasonable doubt restraint of trade effected by a "contract, combination in the form of a trust or otherwise, or conspiracy" between separate entitled to constitute a felony. 15 U.S.C. § 1; *Copperweld,* 467 U.S. at 768. If two corporations form a single economic unit and serve a common interest, they are engaged in unilateral activity and cannot conspire with one another such as § 1 violated. *Guzowski v. Hartman*, 969 F.2d 211, 214 (6th Cir. 1992). Concerted activity is a requirement of § 1.

In this case, a parent and its wholly owned subsidiary are alleged to have violated § 1 which raises the question of whether entitled with common ownership can conspire for purposes of § 1 of the Sherman Act. The Supreme Court addressed this narrow question (the "intra-enterprise conspiracy" doctrine) in *Copperweld*, 467 U.S. at 755, 759, and held that a parent and its wholly owned subsidiary are incapable of conspiring with each other for purposes of § 1. The Court provided the following reasoning in reaching that determination:

> The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.
>
> . . .
>
> For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate cor-

> porate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.
>
> Indeed, the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when 'the conspirators had a unity of purpose of a common design and understanding, or a meeting of minds in an unlawful arrangement.' But in reality a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interest.

Id. at 769-72.

In this case, there is no dispute that CMS is the parent and holding company of Consumers. (Compl., § 8; Def. Br. at 2). Count IV of Indeck's complaint alleges that § 1 was violated when Consumers entered into long-term exclusive dealing contracts with GM and other at-risk industrial/commercial customers, and CMS "actively and knowingly participated in [Consumers'] anticompetitive scheme," "exerted its influence to achieve [Consumers'] anticompetitive ends," and "benefited therefrom." (Compl., ¶¶ 68-71). Based on the allegations in the complaint, the "separate entities" required by § 1 are CMS and its wholly owned subsidiary Consumers. As a matter of law, CMS and Consumers are not separate entities and thus, are incapable of conspiring with the meaning of § 1 of the Sherman Act. *See Copperweld*, 467 U.S. at 776; *Guzowski*, 969 F.2d at 213.

At oral argument, Indeck argued that the complaint does not assert an intra-enterprise conspiracy theory and claimed

that CMS "participate," together with its subsidiary, in long-term exclusive dealings contracts in restraint of trade. (Tr. at 25-28). However, Indeck concedes that CMS did not itself enter into any contracts with GM or other customers. (*Id.* at 36, 39). Indeck claims that CMS is liable because CMS "influenced" it s subsidiary to go out and engage in alleged anti-competitive conduct. (*Id.* at 38). These arguments are unavailing. CMS and its wholly owned subsidiary can engage only in unilateral activity. *See Copperweld*, 467 U.S. at 771-72. Any allegation of concerted activity under § 1 in this case is precluded, whether the word "conspiracy" is used or not. The court finds that Court IV should be dismissed.

B. § 2 Sherman Act

The next question is whether CMS, as a parent company, can violate § 2 of the Sherman Act. Section 2 punishes "very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . ." 15 U.S.C. § 2. The elements necessary to plead monopolization are:

(1) possession of monopoly power in the relevant market and

(2) the willful acquisition or maintenance of that power as distinguished from growth or development of a consequence of a superior product, business acumen, or historical accident.

Beard v. Parkview Hosp, 912 F.2d 138, 144 (6th Cir 1990) (quoting *United States v. Grinnell Corp.*, 384 US. 563, 570-71,86 S. Ct. 1698,16 L.Ed.2d 788 (1966)); *see also Delaware Health Care, Inc., v. MCD Holding Co.*, 893 F. Supp. 1279, 1286 (D. Del. 1995). It is plaintiffs' burden to show that defendant "either unfairly attained or maintained monopoly." *Beard*, 912 F.2d at 144. Monopoly power is "the power to control prices or exclude competitors." *United States v. DuPont*, 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed.2d 1264 (1956); *Tarrant Service Agency v. American Standard, Inc.*, 12 F.3d 609 615 (6th Cir. 1993).

The elements necessary to plead attempted monopolization are:

(1) that the defendant has engaged in predatory or anticompetitive conduct with

(2) specific intent to monopolize and

(3) a dangerous probability of achieving monopoly power.

Delaware Health Care, 893 F. Supp. at 1286; *Beard*, 912 F.2d at 144. Plaintiffs must allege both the existence of a dangerous probability that defendant would monopolize a particular market and specific intent to monopolize. *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 459, S. Ct. 884, 122 L.Ed.2d. 258 (1993). The inquiry is not whether defendant engaged in "unfair' or "predatory" tactics, but rather whether defendant intended to monopolize or there is a dangerous probability of monopolization:

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law direct itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Id.

Counts I and II allege that CMS "actively and knowingly participated in Consumer's anticompetitive scheme," "exerted its influence to achieve Consumer's anticompetitive ends," and "benefited therefrom," thus monopolizing or attempting to monopolize the relevant at-risk market in violation of § 2 of the Sherman Act. (Compl., §§ 52-53, 58-59). Indeck asserts that CMS engaged in "acts or actual and attempted monopolization alleged in the complaint, both as a direct actor itself and as a controlling parent of Consumers." (Pl. Br. at 8). Indeck sets forth the allegations against CMS at following:

45. [Consumers] has engaged in the foregoing conduct with CMS' knowledge and active involvement, which was designed to achieve and anticompetitive ends for the benefit of [Consumers] as a seller of electricity as well as for CMS as both the corporate parent of [Consumers] and principal source of captive alternative power through its [Midland Cogeneration Venture Limited Partnership] affiliate.

46. To summarize, defendants have engaged in at least the following anticompetitive and predatory acts:

(a) Entering into a series of long-term exclusive dealing contracts with targeted 'at risk' industrial and commercial customers within [Consumers'] service area . . .;

(b) Offering bundled discounts on different GM plants to induce GM not to deal with Indeck . . .

(c) Offering discounts to other 'at risk' customers conditioned on the understanding or agreement that the customer not deal with Indeck . . .;

(d) Refusing independents meaningful access to essential facilities and resources controlled by [Consumers] and needed to operate in independent facility . . .;

(e) Placing Indeck in a predatory 'price-cost-squeeze' by offering targeted 'at risk' customers discounted prices for their electric power, while at the same time engaging in a bad faith refusal to negotiate and execute a reasonable standby contract, and charging excessive interconnection charges and other fees coupled with unreasonably low payments for excess power;

(f) Suppressing competition by eliminating competitive cogeneration projects;

(g) Tortiously interfacing with Indeck's prospective economic advantage with GM; and

(h) Breaching its commitment in a 1992 settlement agreement with a number of independent cogenerators, including Indeck, to facilitate the development of independent power in its service territory. . .

(Compl., §§ 45-46). Indeck argues that CMS engaged in "acts of actual and attempted monopolizing alleged in the complaint, both as a direct actor itself and as a controlling parent of Consumers." (Pl. Br. at 8).

CMS, however, asserts that all substantive allegations in the complaint are directed to Consumers. CMS claims that the only charge against it is "participation" in Consumer's anticompetitive scheme, thus being equivalent to alleging that CMS and its wholly owned subsidiary acted in concert.[6] (Def. Br. at 5-6). CMS argues that a parent corporation simply cannot conspire with its wholly owned subsidiary for purposes of § 1 or § 2 of the Sherman Act.

CMS is correct that courts have held that a parent company cannot conspire with its wholly owned subsidiary for purposes of § 2. (See *id.* at 6-7). This, however, is not dispositive. In addition to a claim of conspiracy, § 2 provides a cause of action for both monopolization and attempted monopolization. 15 U.S.C. § 2. Indeck alleges that CMS monopolized and attempted to monopolize in violation of § 2. The court must construe the complaint in the light most favorable to Indeck and accept as true all well-pleaded facts. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987). Indeck is not alleging conspiracy; thus, the court declines CMS' invitation to interpret "participation in" as a disguised pleading of conspiring to monopolize. (*Cf. MCI Telecommunications Corp. v. Graphnet, Inc.,* 881 F. Supp 126, 130-31 (D.N.J. 1995) ("participation" alleged in complaint is conduct with constitutes aiding and abetting which fails to

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[6] During oral argument this was also characterized as an "aiding and abetting" theory of liability.

state an antitrust cause of action and is an attempt to circumvent the limitation on intra-enterprise conspiracy claims).

The question before the court is whether Indeck has properly pled the elements necessary to prove a violation of § 2. To this end, CMS argues that Indeck failed to allege in their complaint that CMS is a competitor in the relevant at-risk market or has engaged in any anticompetitive conduct. (Def. Br. at 2). CMS attests that it does not sell electricity and, therefore, is not part of the relevant at-risk market. These facts, CMS proposes, are sufficient to preclude liability. (Def. Reply Br. at 3-4).

The parties agree that CMS is not a utility and does not sell energy. (Compl. §§ 7-8). Indeck concedes that CMS was not a party to the contracts at issue. (Tr. at 36, 39). Indeck has not alleged that CMS has a customer base or operates any energy facilities. Although the complaint states that "defendants" engaged in certain activity, Indeck concedes that many of these activities were done solely by Consumers and attributed to CMS only because Indeck believed that CMS was involved in the decision-making process. (Tr. at 40, 46). The court is not asked to decide whether such conduct could give rise to liability, only whether Counts I and II set forth the material elements of monopolization or attempted monopolization. The court finds no facts within the four corners of the complaint which allege how CMS possessed monopoly power, or probability or achieving such monopoly power, in the relevant market.[7] *See Beard*, 912 F.2d at 144-45; *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104-05 (4th Cir. 1987).

Being a competitor in the relevant at-risk market is a central requirement of both monopolization and attempted monopolization. Indeck's complaint set forth that CMS is a parent and holding company of defendant Consumers. (Compl., ¶ 8). The complaint does not allege, and Indeck has con-

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[7] Plaintiffs define the relevant at-risk market as electric sales to industrial/commercial customers in the 68 counties in Michigan's lower peninsula in which defendant Consumers operates. (Pl. Br. at 5).

cluded, that CMS does not sell electricity and is not a competitor in the relevant at-risk market. This deficiency is fatal to both the claim of monopolization and of attempted monopolization. Indeck's bare allegations that CMS "actively and knowingly participated" and "exerted its influence" are simply insufficient to constitute the level of competitive action required by § 2 of the Sherman Act. Therefore, Counts I and II should be dismissed.

C. Illegal Discounts

Indeck also asserts that CMS violated § 3 of the Clayton Act. Indeck reiterates in Count III that CMS has "actively and knowingly participated in [Consumers] anticompetitive scheme," and "exerted its influence to achieve [Consumers'] anticompetitive ends," and "benefited therefrom." (Compl., ¶ 64).

In order to state a claim under ¶ 3, a defendant must be;

(1) engaged in commerce,

(2) and lease or make a sale or contract for sale of goods or other commodities,

(3) on the condition that the lessee or purchaser thereof shall not use or deal in the goods or commodities of a competitor,

(4) where the effect of such lease, sale or contract for sale may be too substantially lessen competition or tend create a monopoly in any line of commerce.

15 U.S.C.§ 14. Section 3 condemns only joint activity.[8] *M & M Medical Supplies*, 738 F. Supp. at 1022.

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[8] To the extent Indeck is claiming that CMS and Consumers acted together in entering into anticompetitive contracts, such a claim constitutes mere unilateral conduct by a parent company and its wholly owned subsidiary. This is fatal to a claim under § 3 of the Clayton Act for the same reasons articulated in *Copperweld*, 467, U.S. at 771-74, and set forth with regard to § 1 of the Sherman Act claim. See *Ad-*

CMS argues that the complaint fails to allege that it engaged in commerce to lease, make a sale or contract for sale. (Def. Br. at 10). Rather, CMS claims that this alleged conduct is attributed solely to Consumers, which sold energy and entered into contracts with GM and other industrial/commercial customers, (*Id.*; Compl., §§ 35, 39). Indeed, the complaint specifically alleges that the exclusive dealings contracts were entered into by Consumers, not CMS. (Compl., § 62; Tr. At 36, 39).

While Indeck concedes that CMS did not enter into the contracts at issue, Indeck claims that a corporate parent such as CMS need not be directly involved in the contracts to be liable under the Clayton Act. (Pl. Br. at 8). Indeck claims that "the question is not whether CMS itself had contractual 'privity' with the affected customers, but whether its relationship to Consumers and the challenged conduct was such that it, too, can be held liable" as "a direct participant in the scheme to use the contracts" or "a controlling corporate parent." (*Id.* at 8-9). Indeck relies on *Standard Oil Co. of California v. United States*, 337 U.S. 293 69 S. Ct. 1051, 93 L.Ed. 1371 (1949), for the proposition that liability under the Clayton Act falls on both the corporate parent and its subsidiary. (Pl. Br. at 8). In that case, the parent company, acting through its wholly owned subsidiary, entered into exclusive supply requirements contracts with independent dealers and service stations. *Standard Oil*, at 294-95, n.1. In affirming the lower court's determination that § 3 of the Clayton Act had been violated, the Supreme Court examined only what would be allowed as a measure for the Clayton Act's requirement that a contract, etc., must have the "effect . . . to substantially lessen competition. . . ." *Id.* at 299. The Court said that "§ 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affect." *Id.* at 314. No "controlling parent" analysis was attempted by the Court. Therefore, this court fails to see how the Supreme Court's decision in *Standard Oil* is instructive in

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vanced Health-Care Serv. v. Radford Com. Hosp., 738 F. Sup. 1017, 1022-23 (S.D.W.Va. 1990).

this case. Here, the parent company did not enter into the contracts at issue and has been accused of no act whose effect "may be to substantially lessen competition or tend to create a monopoly."

The court finds that the essential elements of the Clayton Act have not been plead in this case. The complaint simply dose not allege, nor it there any evidence proffered, that CMS contracted for the sale of goods or other commodities. *See* 15 U.S.C. § 14. Indeck's generalized allegation of "knowledge," "participation," and exerted "influence" on behalf of CMS, based on a *respondeat superior* theory of liability, is insufficient. As a result, Count II should be dismissed.

D. Tortious Interference

In order to establish a *prima facie* case of tortious interference with a business relationship, plaintiffs must show:

(1) the existence of a valid business relationship or expectancy;

(2) knowledge of the relationship or expectancy on the part of the interferer;

(3) an intentional or improper interference with the relationship that induces or causes a breach or termination of the relationship or expectancy; and

(4) resultant damage to the party whose relationship or expectancy has been disrupted.

DXS, Inc., v. Siemens Medical Systems, Inc., 100 F.3d 462, 469 (6th Cir. 1996). As recently set forth by the Sixth Circuit:

> a Michigan plaintiff 'must allege the intentional doing of a per se wrongful act or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship.' 'Malice' in the legal sense is the intentional doing of a wrongful act without justification or excuse. And a 'wrongful' act is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right.

Chrysler Intern. Corp. v. Cherokee Export Co., 134 F.3d 738, 745 (6th Cir. 1998) (citations omitted).

Indeck alleges that they had a valid business relationship or expectancy with GM, of which CMS had knowledge. (Compl., §§ 74-75). Indeck further alleges that CMS interfered with this relationship by (1) entering into long-term exclusive dealing contract with GM, (2) bundling discounts on different plants, (3) refusing Indeck meaningful access to facilities and resources, and (4) placing Indeck in a predatory "price-cost squeeze" by offering GM deeply discounted prices for electrical power. (*Id.*, ¶ 76).

CMS asserts that none of these factual allegations are attributable to it even though the complaint refers to "defendants." CMS argues that the complaint, read as a whole, reveals that Indeck is claiming that Consumers entered into a contract with GM, bundled discounts, and denied Indeck access to essential facilities and resources. (Def. Br. at 12; *see* Compl., §§ 34, 37, 30-32).

Having failed to plead the necessary elements of monopolization, attempted monopolization, or illegal discounts, and being precluded from arguing application of § 1 of the Sherman Act, no antitrust violation has been set forth. Merely alleging "active and knowing participation" and "exertion of influence over" a subsidiary is nothing more than the equivalent of alleging that CMS is a parent and holding company. Such a claim simply does not amount to a specifically alleged per se wrongful act or a lawful act done with malice. Therefore, an essential element of tortious interference has not been properly alleged against CMS in the complaint. As a result Count V should be dismissed.

IV. Conclusion

Accordingly, IT IS ORDERED that defendant CMS's motion for dismissal is GRANTED. Count I through V fail to state a claim against CMS Energy Corporation upon which relief may be granted.

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

September 17, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

INDECK ENERGY SERVICES, INC., an Illinois Corporation, and INDECK SAGINAW LIMITED PARTNERSHIP, an Illinois limited partnership,

plaintiffs,

CONSUMERS ENERGY COMPANY, a Michigan corporation, and CMS ENERGY CORPORATION, a Michigan corporation,

defendants.

Case No. 97-10368

JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs, Indeck Energy Services, Inc. and Indeck Saginaw Limited Partnership (collectively "Indeck"), for their complaint against defendants Consumers Energy Company and CMS Energy Corporation (collectively "defendants"), state as follows:

I.

PRELIMINARY STATEMENT

1. Indeck is an independent power production company in the business of developing cogeneration power facilities and selling the electricity and other forms of energy which it

produces. Consumers Energy Company ("CEC") is the monopoly seller of electricity to retail customers within the 68 counties in the lower peninsula of Michigan in which it operates. Its corporate parent, CMS Energy Corporation ("CMS"), is a multi-billion dollar company that derives most of its operating revenues from electricity and natural gas sales by CEC.

2. This case arises from the defendants' illegal response to the legitimate threat of competition from Indeck and other independent power producers for large "at risk" industrial/commercial customers -- those capable of obtaining electric power from cogeneration or other independent power producers, rather than from CEC. In particular, defendants implemented an illegal and anticompetitive scheme to:

(a) lock up most of the at risk industrial/commercial customers with long-term exclusive dealing contracts;

(b) stall and frustrate the efforts of Indeck and other independent power producers to enter the market by denying them meaningful access to essential facilities and resources available only from CEC;

(c) violate relevant federal statutes and regulations mandating that utilities provide essential facilities to independent power projects; and

(d) pursue other illegal and anticompetitive tactics described below.

3. Defendants' scheme proved so injurious to competition that by 1996, defendants openly announced that CEC had already locked up "more than 87 percent of its at risk industrial electric load." At the same time, defendants also openly predicted that "larger energy companies" such as CMS would ultimately take over "most independent power production companies" with "only a few large, independent power generators surviving."

4. Defendants not only blocked Indeck and other independents from entering the market and thereby injured

competition, but also created an artificial power supply shortage for CEC which defendants exploited by having CEC purchase more expensive electricity from another of the defendants' affiliates, the Midland Cogeneration Venture Limited Partnership ("MCV"). Defendants' conduct has all been in violation of the federal antitrust laws, in derogation of the public interest, and has caused Indeck actual damages exceeding $100 million, before trebling under the antitrust laws.

II.

PARTIES, JURISDICTION AND VENUE

5. Plaintiff Indeck Energy Services, Inc. is an Illinois corporation with its principal place of business in Buffalo Grove, Illinois. It has the experience, expertise and financial strength to successfully develop large-scale cogeneration and other independent power production facilities. The company has developed, constructed and brought into full operation numerous independent power generation plants. These facilities range in size from approximately 20 megawatts ("MW") to 125MW of electricity.

6. Plaintiff Indeck Saginaw Limited Partnership is an Illinois limited partnership that was formed for the purpose of developing a cogeneration facility to sell electricity and steam to General Motors ("GM") at GM's Saginaw, Michigan automotive plant.

7. Defendant CEC is a Michigan corporation with its principal place of business at Jackson, Michigan. Until the first quarter of 1997, CEC was called Consumers Power Company. CEC is a public utility that sells electricity and natural gas to residential, industrial and other customers in the lower peninsula of Michigan. CEC is the monopoly provider of electricity to retail customers in the 68 counties of Michigan's lower peninsula in which CEC operates. CEC's total operating revenues in 1996 exceeded $3.7 billion.

8. Defendant CMS is a Michigan corporation with its principal place of business at Jackson, Michigan. CMS is the parent and holding company of defendant CEC. CEC's operations in the electric and gas utility businesses account for

most of CMS's total assets, revenues and income. CMS and CEC share common officers and directors at the highest level.

9. This Court has subject matter jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1337 because this action arises under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26) and seeks relief for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and Section 3 of the Clayton Act (15 U.S.C. §14). This Court also has subject matter jurisdiction pursuant to 28 U.S.C. §1332(a), because there is complete diversity of citizenship between the parties and the matter in controversy exceeds $75,000 exclusive of interest and costs. The Court has supplemental jurisdiction over Count V of this Complaint pursuant to 28 U.S.C. §1367.

10. Venue is proper in this judicial district under 15 U.S.C. §22 and 28 U.S.C. §1391, because CEC and CMS transact business and reside in this judicial district.

11. Defendants are engaged in, and their activities substantially affect, interstate commerce.

III.

STATEMENT OF FACTS

The Relevant Market

12. "Cogeneration" is the simultaneous production of electrical power and some other useful form of energy, typically steam, that is also needed by the customer. Cogenerated electrical power may be sold to the host customer (e.g., General Motors), as an alternative to the host's purchases of electricity from the local public utility (i.e., CEC).

13. Cogeneration and other independent power production is an efficient and cost effective way to generate electricity as an alternative to traditional utility power production. However, due to the high costs of constructing and installing an independent power production facility, cogeneration and other forms of independent power production tend to be economically viable only for large industrial and other major commercial users of electricity.

14. CEC's customers include large industrial and commercial concerns for whom cogeneration or other independent

power production is a viable alternative to purchasing electricity from CEC. These customers constitute a discrete and insular market segment which are "at risk" of purchasing electricity from cogenerators or other independent power producers rather than CEC. Electric sales to these "at risk" industrial/commercial customers within the 68 counties of Michigan's lower peninsula in which CEC operates constitute a relevant market or submarket (hereafter the "Relevant At Risk Market"). CEC has recognized and acknowledged the existence of this discrete market segment. Indeed, CEC has admitted that its "at risk" industrial/commercial customer base is "severely threatened by serious and increasing competition" from Indeck and other independent power producers.

Defendants Have Historically Monopolized and Controlled the Relevant Market

15. Historically, the ability of independent power producers to compete with traditional public utilities for such "at risk" customers was impeded by the public utilities' refusal to deal with independents, and by the utilities' control over essential electric transmission lines and other essential facilities within their monopoly service areas. The public utilities exploited this control and thwarted competition from independent power producers by, among other tactics, (a) refusing to buy excess power generated by the cogenerator or other independent power facility, (b) refusing to sell supplemental or standby power to customers installing or planning to install cogeneration or other independent power facilities and (c) refusing to transmit power from the independent power facilities to other potential customers.

16. Recognizing these impediments, in 1978 Congress enacted comprehensive federal legislation known as the Public Utilities Regulatory Practices Act ("PURPA"), 16 U.S.C. §824 et. seq. Among other things, PURPA was intended to encourage the production of electricity by cogenerators such as Indeck.

17. Acting on Congress' mandate under PURPA, in 1980 the Federal Energy Regulatory Commission ("FERC") prom-

ulgated regulations for qualifying facilities designed to "encourage cogeneration and small power production. " These regulations require that electric utilities such as CEC (a) purchase electric capacity and energy from qualifying facilities at the utility's full avoided cost, (b) sell standby and other supplemental power to qualifying facilities at fair and reasonable rates and (c) make all necessary interconnections with the qualifying facility to transmit the power. 18 C.F.R. §292.303-306. In addition, public utilities are prohibited from paying rates to qualifying facilities which discriminate against them in favor of the utility's own or affiliated sources of power. Id. at §292.304(a)(ii).

18. Defendants responded to the threat of competition from Indeck and other independent power producers with an anticompetitive campaign to prevent the independents from successfully taking root and competing with them for customers within the Relevant At Risk Market.

19. Beginning in the 1980s, Indeck and other independent power producers attempted to enter the market and construct independent power projects in competition with CEC. Rather than facilitating these projects, CEC refused to deal in good faith with Indeck and other independent producers. Instead, defendants directed the formation of MCV as their own dedicated source of additional capacity. CEC then attempted to steer all of its capacity purchases to MCV and excluded the entry of new competitive sources of capacity.

20. MCV was and remains a close affiliate of defendants. In particular, defendants' subsidiaries include four MCV-related entities that hold substantial leasehold, equity, supply and other economic interests in MCV. As a consequence, defendants have stood to gain substantially by favoring MCV as a source of power over Indeck and other unaffiliated independents. Indeed, in a 1989 opinion and order, the Michigan Public Service Commission ("MPSC") remarked that it was "apparent" that CEC's overwhelming "corporate object" was to buy as much power as it could from MCV, "regardless of the interests of its ratepayers or the policies embodied in PURPA."

21. Pursuant to defendants' scheme to favor MCV over true independents, CEC executed a thirty-five year contract with MCV in 1987. This contract committed CEC itself to buy 1240MW of electrical power from MCV until the year 2025. At the time, MCV was not even producing power and would not be for three more years. Defendants thereafter attempted to thwart the efforts of Indeck and other independents to develop independent power projects within CEC's monopoly service territory.

22. By 1989, CEC's self-dealing and delay tactics had become so blatant that the MPSC openly admonished CEC for its continued efforts to keep true independents out of the market. In an Opinion and Order of June 22, 1989, the MPSC recognized this pattern and required CEC to negotiate purchase contracts with the independents for approximately 400MW of power. In a press release issued the same day, the MPSC emphasized that it was "counting on [CEC] to . . . sign the contracts with other projects, thereby permitting cogeneration and small power production to go forward in its service territory." As the MPSC later noted, CEC's response was to simply refuse to negotiate.

23. After two more years of continued delays and intransigence by CEC, the independents agreed to a "settlement" with CEC in 1992 under which they gave up roughly half of their original output rights under the 1989 MPSC Order at substantially reduced prices. In return, defendants assured the MPSC, Indeck and other independents that they would no longer stand in the way of the MPSC's expressed goal of "encouraging development of a diverse, non-utility power generating industry in Michigan." However, that assurance was hollow as events following the 1992 settlement demonstrate that defendants' real intent was to continue blocking the market entry efforts of true independents, thereby constraining the entry of competitive new capacity into the marketplace.

Indeck Devoted Substantial Resources To

Developing Cogeneration Projects For GM

24. Indeck had begun discussions in 1991 with officials of General Motors Corporation ("GM") concerning potential cogeneration opportunities. GM asked Indeck to develop a

cogeneration facility to serve GM's Saginaw Steering Division Plant in Saginaw, Michigan (the "Saginaw Project"). Later that year, Indeck submitted a proposal to GM for the development of a cogeneration facility at GM's Saginaw plant. Following extensive negotiations and discussions, on May 13, 1994, Indeck and GM entered into a cogeneration development contract (called an Energy Sales Agreement) for the Saginaw Project. Indeck was to develop, construct and operate a cogeneration facility to sell electricity and thermal power to GM.

25. Indeck pursued the Saginaw Project at great expense. This included extensive design and development work, negotiations with natural gas suppliers and transporters, securing permits and approvals, retention of consultants and attorneys, issuing letters of credit, working with local governmental entities, contacting and negotiating with sources of financing and negotiations with CEC.

26. Contemporaneously with ongoing work on the Saginaw Project, GM advised that Indeck was also being considered to develop a project to supply the electrical and thermal requirements at GM's Flint, Michigan Cadillac Luxury Car Division plant (the "Flint Project"). In February 1994, GM selected Indeck as the preferred developer for the Flint Project. Thereafter, Indeck began substantial development efforts on the Flint Project.

Defendants Used Their Monopoly Power to Sabotage The Market Entry of Indeck and Other Independent Power Producers

27. CEC controlled a number of essential facilities and resources necessary and vital to the success of the Indeck Saginaw and Flint projects and other independent power projects, including:

(a) The ability to interconnect to CEC's electrical power grid and natural gas delivery system;

(b) The ability to provide electrical transmission and gas transportation services;

(c) The ability to provide standby power; and

(d) The ability to enter into a power purchase agreement with CEC, for the purchase of excess electrical capacity and energy from the cogeneration facilities.

Indeck could not simply duplicate CEC's essential facilities and resources, due to the extremely high capital costs of such facilities and state regulatory and local constraints on duplicating the facilities, all of which created extraordinarily high barriers to market entry.

28. CEC's control of these essential facilities and resources gave it monopoly power which, together with other illegal conduct by CEC, ultimately frustrated the successful realization of the Saginaw and Flint Projects and other independent power projects, as set forth below.

29. Pursuant to their anticompetitive scheme, defendants exploited CEC's control over its essential support facilities and resources to deter Indeck's market entry and the entry efforts of other independents. CEC has thereby maintained its monopoly control over the retail sale of electricity in the Relevant At Risk Market.

30. In particular, despite Indeck's extensive efforts to obtain a standby power agreement from CEC for the Saginaw Project (a necessary and essential item for a successful cogeneration facility), CEC refused to negotiate in good faith with Indeck. Rather, CEC imposed on Indeck unreasonable and inconsistent conditions and sought standby rate increases of as much as 859%.

31. Further, despite publicly professing a need for additional capacity to meet the projected electric requirements of all its customers, CEC stalled and refused Indeck's efforts to sell excess power from the Saginaw Project to CEC. Thus, CEC responded to Indeck's efforts to negotiate an excess power agreement with CEC by professing a lack of interest, falsely asserting that it could not negotiate with Indeck, offering unreasonably low rates for the excess power and as-

serting that it "was not in a position to enter into" an excess power agreement with Indeck.

32. CEC likewise delayed and impeded Indeck's access to interconnection with CEC's electric transmission system by failing to complete essential steps in a timely manner and setting up unreasonable financial barriers for interconnection. In addition, CEC imposed unreasonable and costly equipment purchase and installation requirements on Indeck as a condition to interconnecting with the CEC transmission system so that Indeck could obtain essential standby power from CEC and sell excess power to CEC. The net result of such conduct by CEC was, as alleged above, to substantially delay and drive up the costs of Indeck's efforts to develop the Saginaw and Flint Projects.

33. Despite CEC's extensive efforts to prevent Indeck from successfully establishing cogeneration projects for GM, Indeck nonetheless attempted to complete the Saginaw and Flint Projects. In addition, other independent power projects were then underway at other "at risk" customer sites within CEC's service territory. Beginning in late 1995, CEC responded to these competitive threats to its monopoly by taking the ultimate anticompetitive action. It entered into a series of "lock-up" contracts with the at risk customers.

Defendants Ultimately "Locked Up" Over 80% of the Relevant Market

34. In particular, on October 13, 1995, CEC executed a long-term exclusive dealing contract with General Motors for nineteen of GM's facilities, specifically including the Flint facility, with an "option" to add the Saginaw facility.

35. On October 25, 1995, CEC publicly announced that under its exclusive dealing contract with GM, CEC would be "the sole supplier" of electricity "for periods of between five and ten years at 19 of [GM's] manufacturing facilities currently served by [CEC]." In the same press release, CEC also stated that those GM "facilities account for . . . approximately 65 percent of the industrial load which [CEC] considered at risk to competitive alternatives."

36. Under this exclusive dealing contract, CEC is designated "the sole supplier of all electric energy for the operation of GM's facilities." The contract further provides that:

> GM shall purchase all of its requirements for electric power for all of the Facilities . . . and shall not install or operate any generation equipment or purchase power from others during the term of the Contract . . . . (Emphasis added.)

37. Not content with locking up 19 GM facilities, CEC placed before GM an irresistible incentive to make the Saginaw facility the 20th to fall captive to CEC's scheme. GM was given the "option" of adding the Saginaw plant to the contract. If GM did so, CEC granted a multi-million dollar discount to GM for all of the facilities covered by the contract, and not just Saginaw. CEC accomplished this objective by including on page 3 of Attachment 2 of the exclusive dealing contract a provision which states:

> In the event that all locations on Attachment No. 1 to this contract, plus Delphi Saginaw Steering Systems, use [CEC] as the sole supplier of electric energy during the contract term, each location shall receive an on-peak billing demand credit on the above rates in the amount of $.32 per kW per month. (Emphasis added.)

38. Not surprisingly, GM later exercised the "option" to add the Saginaw facility to the exclusive dealing contract, thus locking up at least 520MW of GM's electrical needs for up to 10 years at twenty different GM facilities.

39. Meanwhile, CEC also signed long-term exclusive dealing contracts with at least 17 other "at risk" industrial/commercial customers which, together with GM, represented over 80 percent of total potential electrical sales in the Relevant At Risk Market.

40. CEC entered into exclusive dealing contracts with at least the following such customers: Bundy Tubing; Dow Corning; Hemlock Semiconductor Corporation; Upjohn Company; James River Company, Inc.; Macsteel Leprino Foods Company; Michigan Limestone Operations; Lorin Industries, Inc.; Tecumseh Products Company; Solvay Auto-

motive, Inc.; Ramco Gershenson Properties; Wacker Silicones Corporation; TRW, Inc.; Lomac, Inc.; CSM Industries, Inc.; Sun Chemical Corporation; and Briggs & Stratton Corporation.

41. Under each of these contracts, CEC is designated the "sole supplier" of electricity to the customer for contract terms of between 4 and 10 years. As part of its scheme to forestall and exclude competition and to deter the entry of competing electrical capacity, many of the contracts also expressly prohibit the customer from installing its own generation equipment during the term of the contract. This prevents the customers from taking preparatory steps toward developing independent power projects until after the contracts expire. The contracts also provide further discounts conditioned on the customer's agreement to buy power solely from CEC and not from competitors. CEC itself has described the purpose of each of these contracts as the retention of the "at risk customer."

42. The lower rates offered to the targeted "at risk" customers occurred at or about the same time that CEC was refusing to execute a standby power contract with Indeck, when CEC was demanding excessive interconnection and other fees from Indeck and when CEC was offering unreasonably low payments for excess power. The effect was to place Indeck in an exclusionary "price-cost" squeeze that prevented it from economically competing with CEC's discounted prices to GM and other targeted customers.

Defendants' Have Illegally Excluded Competition In the Relevant Market

43. Pursuant to this anticompetitive scheme, CEC unlawfully foreclosed Indeck and other true independents from providing retail power to the Relevant At Risk Market as a supplement to CEC's own utility production. As a consequence, CEC put itself in a position where it had insufficient capacity by 1996 to meet the projected needs of its captive residential and small business customers. As alleged above, CEC has exploited this situation by purchasing power for these captive customers from MCV. CEC has thus favored its own affiliated power producer

over true independents. As a consequence, CEC has excluded true independents as a competitive constraint on CEC and as alternative sources of supply.

44. In short, defendants have succeeded in excluding competition from over 80 percent of the Relevant At Risk Market while at the same time keeping potential supplemental and alternative sources of electrical power out of the market. Defendants' anticompetitive and tortious acts have caused substantial injury to Indeck and have also injured competition in the Relevant At Risk Market by:

(a) preventing the development of competing independent power facilities, thereby constraining the market entry of efficient new capacity;

(b) depriving customers of competing low-cost alternatives for electric power; and

(c) wrongfully steering its capacity needs to its own affiliate to the exclusion of competitive sources of independent power production.

CMS IS LIABLE WITH CEC

45. CEC has engaged in the foregoing unlawful conduct with CMS' knowledge and active involvement, which was designed to achieve anticompetitive ends for the benefit of CEC as a seller of electricity as well as for CMS as both the corporate parent of CEC and principal source of captive alternative power through its MCV affiliate. At all relevant times, CMS and CEC have shared officers and directors at the highest level. On information and belief, CMS exerted its influence to further defendants' anticompetitive ends.

46. To summarize, defendants have engaged in at least the following anticompetitive and predatory acts:

(a) Entering into a series of long-term exclusive dealing contracts with targeted "at risk" industrial and commercial customers within CEC's service area under which the customers have agreed to purchase their electricity exclusively from CEC and most have

further agreed not to install or purchase cogeneration or other independent production facilities for prolonged time periods;

(b) Offering bundled discounts on different GM plants to induce GM not to deal with Indeck or any other independent and to, instead, purchase electricity exclusively from CEC for a period of up to ten years or more;

(c) Offering discounts to other "at risk" customers conditioned on the understanding or agreement that the customer not deal with Indeck or other competitors of CEC;

(d) Refusing independents meaningful access to essential facilities and resources controlled by CEC and needed to operate an independent facility, including, among others, transportation of natural gas, electrical transmission, and interconnecting to CEC's electrical transmission systems and violating federal statutes and regulations requiring assistance to cogenerators and other qualified facilities;

(e) Placing Indeck in a predatory "price-cost squeeze" by offering targeted "at risk" customers discounted prices for their electric power, while at the same time engaging in a bad faith refusal to negotiate and execute a reasonable standby contract, and charging excessive interconnection charges and other fees coupled with unreasonably low payments for excess power;

(f) Suppressing competition by eliminating competitive cogeneration projects;

(g) Tortiously interfering with Indeck's prospective economic advantage with GM; and

(h) Breaching its commitment in a 1992 settlement agreement with a number of independent cogenerators, including Indeck, to facilitate the development of independent power

in its service territory and not discriminate against them in favor of defendants' own affiliated cogeneration project, the MCV.

47. As a consequence of defendants' illegal conduct as alleged herein, Indeck and competition have been injured.

COUNT I

(Sherman Act §2 Monopolization)

48. Indeck realleges paragraphs 1 through 47 as though fully alleged herein.

49. CEC has monopoly power in the Relevant At Risk Market, as reflected by such factors as its dominant market share of over 80 percent; by its proven ability to exclude independent power producers from its service area; by the high capital costs and other entry barriers in the market; by its control of essential electrical and gas transmission facilities within its service area; and by its control of essential sources of standby power for customers installing independent production facilities.

50. CEC has willfully acquired, maintained and expanded its monopoly power in the Relevant At Risk Market through the use of, among others, the anticompetitive practices summarized in paragraph 46 above.

51. CEC's conduct is not motivated by efficiency concerns but, instead, reflects its willingness to sacrifice short run profits for a long run exclusionary impact on competitive rivals such as Indeck.

52. CMS has actively and knowingly participated in CEC's anticompetitive scheme, has exerted its influence to achieve CEC's anticompetitive ends, and has benefitted therefrom.

53. Defendants have monopolized the Relevant At Risk Market, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

54. Defendants' anticompetitive conduct has caused Indeck damages in excess of $100 million.

COUNT II

(Sherman Act §2 Attempted Monopolization)

55. Indeck realleges paragraphs 1 through 47 as though fully set forth herein.

56. Defendants have engaged in the anticompetitive acts and practices summarized in paragraph 46 above with the specific intent to acquire monopoly power in the Relevant At Risk Market.

57. At the time defendants engaged in such acts and practices, a dangerous probability existed that if left unchecked, CEC would be able to achieve actual monopoly power in the Relevant At Risk Market, as evidenced by CEC's already dominant position within the market, its already high market share within the market, its control of essential transmission facilities and sources of supplemental standby power, the high capital costs and entry barriers in the market, and other factors indicative of CEC's threatened ability to exclude competition to customers in the Relevant At Risk Market.

58. CMS has actively and knowingly participated in CEC's anticompetitive scheme, has exerted its influence to achieve CEC's anticompetitive ends, and has benefitted therefrom.

59. Defendants' conduct constitutes attempted monopolization of the Relevant At Risk Market, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

60. Defendants' anticompetitive conduct has caused Indeck damages in excess of $100 million.

COUNT III

(Clayton Act §3 Illegal Discounts)

61. Indeck realleges paragraphs 1 through 47 as though fully alleged herein.

62. CEC's exclusive dealing contracts as set forth above constitute sales, discounts and/or rebates involving a commodity (i.e., electricity) conditioned upon the agreement or understanding that the customer will not deal with Indeck or other competitors of CEC. These agreements, conditions and understandings have the tendency to substantially lessen competition in the Relevant

At Risk Market and to create a monopoly for CEC in such market.

63. For example, CEC's exclusive dealing contract with GM provides GM with bundled discounts for twenty different plants (including Saginaw and Flint) on the express condition that GM shall not use or deal with Indeck or any other independent power competitor at any plant covered by the contract for a period of up to 10 years or more. Given the size and importance of GM and the large number of plants affected, the GM contract has substantially lessened competition in the Relevant At Risk Market and has the tendency to create a monopoly for CEC in such market.

64. CMS has actively and knowingly participated in CEC's anticompetitive scheme, has exerted its influence to achieve CEC's anticompetitive ends, and has benefitted therefrom.

65. Defendants' conduct violates Section 3 of the Clayton Act, 15 U.S.C. §14.

66. Defendants' anticompetitive conduct has caused Indeck damages in excess of $100 million.

COUNT IV

(Sherman Act §1 Illegal Exclusive Dealing)

67. Indeck realleges paragraphs 1 through 47 as though fully alleged herein.

68. Through the GM contract and its use of a myriad of other long-term exclusive dealing contracts with targeted at risk customers, CEC has completely foreclosed cogenerators and other independent power producers from over 80% of the Relevant At Risk Market for a prolonged period of years.

69. The effect of CEC's exclusionary contracts with GM and other "at risk" industrial/commercial customers has been to prevent the development of alternate sources of electrical production in the Relevant At Risk Market, to maintain CEC's virtually complete dominance over electrical sales within the Relevant At Risk Market, to thwart the growth of independent power competition as a future competitive constraint on CEC,

and to otherwise deter the introduction of new sources of short and long-term competitive pressure on CEC.

70. CMS has actively and knowingly participated in CEC's anticompetitive scheme, has exerted its influence to achieve CEC's anticompetitive ends, and has benefitted therefrom.

71. Defendants' exclusionary contracts with GM and/or with GM and the other "at risk" customers unreasonably restrain trade within the Relevant At Risk Market, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

72. Defendants' anticompetitive conduct has caused Indeck damages in excess of $100 million.

COUNT V

(Tortious Interference With Prospective Economic Advantage)

73. Indeck realleges paragraphs 1 through 47 as though fully alleged herein.

74. Indeck had a valid business relationship or expectancy with GM as a result of its agreements with GM to develop the Saginaw and Flint Projects, its ongoing relationship with GM as a recognized developer of cogeneration projects, and resulting business possibilities at other GM sites.

75. Indeck's valid business relationship or expectancy with GM was known to defendants.

76. Defendants intentionally and improperly interfered with that relationship or expectancy by the actions set forth above, including:

(a) Entering into a long-term exclusive dealing contract with GM, whereby GM was given substantial discounts at all of its plants in CEC's service area as an inducement to contract exclusively with CEC and to not deal with Indeck;

(b) Bundling of discounts on different plants to induce GM not to deal with Indeck at Saginaw, Flint or elsewhere;

(c) Refusing Indeck meaningful access to essential facilities and resources controlled by CEC and needed to operate an independent facility, including, among others, transportation of natural gas, electrical transmission, and interconnecting to CEC's electrical transmission systems and violating federal statutes and regulations requiring assistance to cogenerators and other qualified facilities; and

(d) Placing Indeck in a predatory "price-cost squeeze" by offering GM deeply discounted prices for electric power, while at the same time engaging in a bad faith refusal to negotiate and execute a reasonable standby contract with Indeck, charging excessive interconnection charges, gas transportation charges and other fees, coupled with unreasonably low payments for excess power; and

77. Defendants' intentional and improper interference with Indeck's relationship or expectancy caused the termination of the relationship between Indeck and GM.

78. Defendants had no valid business justification for the foregoing conduct.

79. Defendants' intentional and improper interference with Indeck's relationship or expectancy with GM caused Indeck damages in excess of $100 million.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that:

A. CEC and CMS be permanently enjoined from engaging in the anticompetitive practices identified above;

B. A judgment be entered for plaintiffs and against CEC and CMS finding that CEC and CMS have violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. §14);

C. Plaintiffs be awarded actual damages of not less than $100 million, trebled as provided by law;

D. Plaintiffs be awarded their costs and attorneys fees incurred in connection with this action;

E. Plaintiffs be awarded punitive damages;

F. Plaintiffs be awarded such other and further relief that the Court deems just, equitable and appropriate; and

G. The parties CEC induced to sign the exclusive contracts be permitted to void or rescind such contracts at their option.

JURY DEMAND

Plaintiffs demand a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by jury.

INDECK ENERGY SERVICES, INC. and INDECK SAGINAW LIMITED PARTNERSHIP

By:_____

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Dated: October 10, 1997

RELEVANT STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * *

Section 3 of the Clayton Act, 15 U.S.C. § 14, provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors

of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * *

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states.

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if –

(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions. For purposes of this section–

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, United States Code, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28, United States Code.

* * * *

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules gov-

erning such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

No. 00-1618

IN THE

Supreme Court of the United States

INDECK ENERGY SERVICES, INC. and
INDECK SAGINAW LIMITED PARTNERSHIP,

Petitioners,

v.

CONSUMERS ENERGY COMPANY and
CMS ENERGY CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

To deal with rapid changes in the electric utility industry, the Michigan Public Service Commission conducted a number of interrelated proceedings dealing with electric rates, supply and access. Petitioner Indeck was an active litigant in several of those proceedings. Pursuant to its explicit statutory jurisdiction, the MPSC issued a series of orders permitting Consumers Energy and Detroit Edison, Michigan's two largest electric utilities, to enter into discount contracts with their major industrial customers, including the Big Three automakers, to encourage those customers not to leave those utilities and thereby increase rates for their millions of remaining customers. Those orders were approved by the Michigan courts.

Indeck, which sought to supply electricity to a manufacturing plant owned by General Motors, Consumers Energy's largest customer, sued Consumers under the Sherman Act, claiming that by entering into a discount contract with GM that had been approved by the MPSC, Consumers had violated that act. The district court dismissed the suit on the grounds of the state action doctrine and Indeck's failure to plead facts showing antitrust injury.

The Sixth Circuit did not reach the state action ruling. Applying precedent of this Court and its own earlier rulings, the Sixth Circuit held that Indeck had failed to plead antitrust injury, thereby depriving it of antitrust standing, because it did not allege facts showing an injury to competition, but only injury to itself.

The question presented is:

Did the Sixth Circuit correctly apply well-established antitrust injury and antitrust standing principles to the allegations of Indeck's complaint?

STATEMENT PURSUANT TO RULE 29.6

Respondent Consumers Energy Company is a wholly owned subsidiary of Respondent CMS Energy Corporation. Respondent CMS Energy Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Consumers Energy Company ("Consumers") is Michigan's largest public utility. It is a wholly-owned subsidiary of CMS Energy Corporation ("CMS"). The two plaintiffs (collectively "Indeck" or "petitioner") construct and operate cogeneration systems, which generate both electricity and steam. Compl. ¶¶1, 5. Indeck contends that it signed a contract with General Motors ("GM") in 1994 to develop a cogeneration facility in Saginaw and that it was being considered by GM for development of a similar project in Flint. Compl. ¶¶24, 26. Indeck alleged that respondents, through actions that it characterized as anti-competitive, forestalled Indeck's proposed cogeneration projects.

The conduct of which Indeck complained was closely regulated by the Michigan Public Service Commission ("MPSC") and the Federal Energy Regulatory Commission ("FERC"). The principal focus of Indeck's complaint was a contract between Consumers and GM that was specifically approved by the MPSC under a clearly articulated state policy to displace competition with regulation. The other allegedly wrongful acts were also the subject of detailed regulation by the MPSC in proceedings in which Indeck was or could have become a participant. Indeck's disappointment as a bidder did not reflect any harm to competition, which was developing under specific orders and rules established by the MPSC. Consumers therefore sought summary judgment under Rule 56 and dismissal under Rule 12(b)(6) on the basis of the state action doctrine and on the failure of Indeck to allege antitrust injury.[1] Consumers' motion was supported by the affidavit of David A.

1. CMS separately sought and obtained dismissal on the basis that, under the *Copperweld* doctrine, it could not be liable for conspiring with its wholly-owned subsidiary, a ruling that is not the subject of Indeck's petition.

Mikelonis, Consumers' Senior Vice President and General Counsel, which explained twenty years of complex regulatory history necessary to an understanding of the context in which Indeck's complaint should be considered. Pursuant to the district court's order, Consumers produced more than 70,000 pages of documents to Indeck and produced Mr. Mikelonis for a three-day deposition on the content of his affidavit.

The district court granted Consumers' motion, ruling that the state action doctrine precluded the antitrust claims against it. The court also concluded that Indeck had not alleged injury of the type the antitrust laws were intended to prevent, and accordingly lacked standing to assert its antitrust claims. The court therefore found it unnecessary to decide Consumers' statute of limitations defense to the claim that in 1987 it had favored its affiliate, the Midland Cogeneration Venture ("MCV"), in the procurement of power supplies.

Pursuant to Michigan statutes, MPSC-promulgated rules, and orders entered in MPSC proceedings, competition among suppliers of utility services has been tightly regulated by the MPSC. Mikelonis Aff. ¶¶11-12, C.A. App. 88.[2] The implementation by the MPSC of FERC rules regarding cogeneration projects resulted in more than fifteen years of complex regulatory proceedings and multiple appeals in which Indeck was an active participant.[3] The result of that litigation was that the MPSC:

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2. References to "C.A. App." are to the Joint Appendix in the Court of Appeals.

3. Mikelonis Aff. ¶32, C.A. App. 109. *Consumers Power Co. v. MPSC*, 189 Mich. App. 151 (1991), 472 N.W.2d 77, *leave to appeal denied*, 439 Mich. 922, 479 N.W.2d 644, *reh. denied*, 442

(Cont'd)

- approved settlements in 1993 and 1996 that allocated procurement by Consumers of cogeneration capacity among competing affiliated and non-affiliated power suppliers, including Indeck;

- established the rates to be paid by Consumers to the power suppliers;

- established a competitive bidding framework for future solicitations of capacity from cogenerators. Mikelonis Aff. ¶¶46-48, C.A. App. 122-124.

In addition to regulating the competition by cogenerators to provide power supplies to Consumers, the MPSC also pervasively regulated the rates paid by retail customers for electricity purchased from Consumers. The cost structure of a utility system includes substantial fixed costs that must be borne by the entire customer base. All other things being equal, the departure of any one customer increases the fixed costs that must be absorbed by all other customers. The allocation of the costs among these customer groups is controlled by the MPSC in a process called "rate design." The MPSC-mandated rate design historically required large-load customers such as GM to bear a disproportionately greater share of such fixed costs, thereby subsidizing smaller customers. Mikelonis Aff. ¶15, C.A. App. 91.

(Cont'd)

Mich. 911, 503 N.W.2d 446 (1993); *ABATE v. MPSC*, 216 Mich. App. 8, 548 N.W.2d 649 (1996). Indeck was a party in both appeals. *See also Attorney General v. MPSC No. 2*, 237 Mich. App. 82, *leave to appeal denied*, 462 Mich. 866 (2000).

In the 1990s these large-load customers began to consider other sources for obtaining electricity. Consumers, like other utilities who faced the same situation, sought to retain these customers and thereby avoid having the additional fixed costs imposed on remaining customers, primarily homeowners and small businesses. Mikelonis Aff. ¶55, C.A. App. 134-135. Initially, Consumers did this by proposing a complete redesign of electric rates to eliminate the subsidy borne by industrial users, a proposal rejected by the MPSC. Mikelonis Aff. ¶15, C.A. App. 91. As other states with more favorable rate designs then sought to attract Michigan's large industries and as those industries seriously considered obtaining electricity from other sources, Consumers was compelled to look for ways to keep its customers. Mikelonis Aff. ¶55, C.A. App. 134-135.

Since Consumers could charge its large-load customers only what the MPSC authorized, its only option was to persuade the MPSC to accept a new rate proposal as being in the interests of all customers by encouraging industrial customers, like GM, to remain with Consumers. Consumers thus sought approval from the MPSC to market capacity that was available from its 1987 contract with its affiliate, MCV. Mikelonis Aff. ¶¶50, 55; C.A. App. 127-128, 134-135. Indeck intervened in both this and a later MPSC proceeding dealing with this new rate proposal. Mikelonis Aff. ¶¶51, 52, C.A. App. 129-132.

Because Michigan regulatory proceedings and associated appeals often take years to resolve, industrial customers, including GM, made it clear that they were unwilling to wait and instead would explore other options. With its case before the MPSC still pending, Consumers negotiated special discount contracts with these customers. Each of these

contracts, including the GM contract at issue here, required filing with and specific approval by the MPSC. Mikelonis Aff. ¶55, C.A. App. 134-135. The GM contract was approved in its entirety by the MPSC in a formal order.[4] That order was affirmed by the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.[5]

After approving the Consumers-GM contract, the MPSC rejected one component of Consumers' rate proposal and approved another, stating:

> . . . [B]y allowing Consumers to compete with other generators, the proposed program may benefit other utility customers by reducing the risk

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4. The MPSC order in case no. U-10961 reads in part as follows:

> There are clear benefits in the contract for Consumers, including the substantial certainty that it will retain General Motors as a customer. There are clear benefits to General Motors, including a reduction in rates, improved quality of service, and assistance in identifying and implementing energy savings programs. There are benefits for other customers, including retaining General Motors' contribution to system fixed costs. *There are benefits to the general public, including the economic effects of retaining and potentially expanding automotive employment in the state.*

(Emphasis added.) Mikelonis Aff. Ex. 50, C.A. App. 165-166.

5. *Attorney General v. Michigan Public Service Commission*, Docket Nos. 193794, 193892 and 193894 (Mich. Ct. Appeals unpublished per curium opinion issued August 18, 1998), *leave to appeal denied*, 460 Mich 870 (1999).

> that the utility's largest (and, in many cases, highest load factor) customers will leave the system. *This part of the proposed settlement thus presents a measured first step in the process of redefining regulation to meet the evolving realities of the electric industry, as well as the needs of both the utility and its customers.* MPSC Order in Case No. U-10685, U-10754, U-10787; Mikelonis Aff. Ex. 51, C.A. App. 284. (Emphasis added.)

Thus, the contract between Consumers and GM, and all other special contracts of which Indeck complained, were a part of a comprehensive regulatory scheme adopted and supervised by the MPSC with clearly articulated policy considerations in mind. This resolution was appealed by the Attorney General and affirmed by the Michigan appellate courts, *Attorney General v. MPSC No. 2*, 237 Mich. App. 82 (1999), __ N.W.2d __, *leave to appeal denied*, 462 Mich. 866, __ N.W.2d __ (2000).

In addition to complaining about the GM contract, Indeck alleged that Consumers refused to offer it a reasonable standby rate; denied it access to essential facilities; denied it gas transportation; and denied it transmission service. Compl. ¶¶27, 28, 30, 32. Each of these matters was comprehensively regulated by the MPSC or the FERC. Consumers had three MSPC-approved rates for standby service. Interconnection was also an area fully regulated by the MPSC and FERC. Gas transportation service was provided by Consumers pursuant to an MPSC-approved tariff according to published rates. Finally, transmission service was also provided by Consumers pursuant to a FERC-approved tariff with a process in place for the agency to resolve disputes. Mikelonis Aff. ¶¶ 66-72, C.A. App. 151-158.

By specifying the rates, terms, conditions, and availability of services offered by a utility, the tariffs served as the instrument by which the regulator controlled and supervised the relationship between a utility and its customer. These tariffs were enforced by the MPSC and any person claiming a denial of services or denial of access under a tariff was free to petition the MPSC for relief. Indeck did not allege that it had ever sought such relief with respect to its claim that Consumers denied it any of these services.

Indeck now asserts that its claims that Consumers denied it access to essential facilities and refused to deal with it were the "principal allegation of the complaint." Pet. at 9 and 18 n.10. However, Indeck — in obvious recognition of the pervasive regulatory scheme described above — scarcely mentioned these allegations in the court of appeals, devoting less than a page of its 60-page brief to its argument that the MPSC did not regulate each of these areas of Consumers' business. *See* Pet. C.A. Brief, p. 39. In both the district court and court of appeals, Indeck's main challenge was to the Consumers-GM contract.

The court of appeals affirmed the district court's dismissal of Indeck's complaint. In a unanimous opinion, the court cited and followed this Court's rulings in *Brunswick v. Pueblo Bowl-O-Mat* and *Associated General Contractors v. California State Council of Carpenters*, as well as numerous other Sixth Circuit and other precedents.[6] Pet. App. 4a-5a: Contrary to Indeck's assertions (for instance, that the Sixth Circuit ruled that where consumers could assert claims, "*only* the consumers had antitrust standing"

6. *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Associated General Contractors of Cal. Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

(Pet. at 18)), the Sixth Circuit prudently applied the multi-factored law of antitrust standing. The Sixth Circuit looks to five factors, none of which is determinative, including "the causal connection" between the harm and the violation, the nature of the injury and the plaintiff's status, the directness of the injury and whether damages are speculative, concerns about duplicative recovery, and "the existence of more direct victims." (Pet. App. at 5a; quoting *Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (CA 6 1983)). The Sixth Circuit also applies this Court's requirement that plaintiffs show antitrust injury. As set out in this Court's seminal *Brunswick* opinion, from which the court below quoted (at 4a): "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489.

In applying the above-stated test, the Sixth Circuit examined a series of factors: Indeck was (allegedly) harmed only as a competitor, not through harm to competition; Indeck had not sufficiently pled facts showing harm to competition; and Indeck's (alleged) injuries were "indirect and speculative." Pet. App. at 5a-6a. GM's decision to purchase from Consumers rather than Indeck, for a limited period of time, did not show antitrust injury, where the complaint had no factual allegation showing how customers were thereby harmed. Thus, "a balancing of the factors to be considered in an antitrust standing case" established an absence of such standing. Pet. App. at 6a.

A similar analysis was applied to Indeck's remaining allegations. As to the discount contracts Consumers made with 17 other large customers, the Sixth Circuit held that Indeck had not alleged that it had contracts with any of them, or even had the ability to serve them. Pet. App. 7a. This holding correctly reflects the fact that Indeck could not conceivably have been harmed in an antitrust sense by Consumers continuing to do business with its own customers, at lower prices than before, where Indeck made no effort whatsoever to compete for those customers.[7] Compl. ¶¶39-41.

In dealing with Indeck's claim that Consumers had favored its affiliate, MCV, when Consumers purchased electricity, the Sixth Circuit noted the total absence of any factual allegation that competition in the sale of electricity had been "destroyed or damaged." Pet. App. 7a. Indeck instead pled only that it had been injured by not being selected as a power supplier to Consumers. Applying the well-established principle that injury to a competitor is not tantamount to injury to competition, the court of appeals correctly found no antitrust injury. In purchasing energy from its affiliate, Consumers naturally made a choice to not buy the equivalent amount of energy from Indeck. But, as the court of appeals observed, "any selection of a competitor in the marketplace will cause economic harm to the entities not chosen for the provision of goods or services." Pet. App. 7a. Given the absence of any factual allegations that Consumers' decision not to buy from Indeck affected

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7. As in the case of the GM contract, Consumers sought and obtained orders from the MPSC approving each of these 17 contracts. Those orders were affirmed by the Michigan appellate courts. Mikelonis Aff. ¶¶56-57 and Table D, C.A. App. 135-138. *See also* n.5.

competition generally and that Indeck's alleged harm reflected such anticompetitive effect, , the court correctly ruled that Indeck had failed to plead antitrust injury and therefore lacked antitrust standing.[8]

REASONS FOR DENYING THE WRIT

This case presents no exceptional circumstances warranting further review by this Court. Indeed, there are multiple reasons not to grant review. As set out below, a decision by this Court would neither determine the outcome of this litigation nor address Michigan statutes and regulations that have continuing vitality, and the legal issue presented to the Court is enmeshed in complicated factual and regulatory controversies that have been the subject of extensive state regulatory and judicial review. Most fundamentally, the Sixth Circuit applied settled law to reach a result entirely consistent with the law of this Court and other circuits.

1. The Sixth Circuit's Decision is Consistent With This Court's Precedents and Decisions of Other Circuits.

The Sixth Circuit cited to and correctly applied the key decisions of this Court on standing and antitrust injury, *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977) and *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).[9]

8. As noted earlier, in buying power from others (including its affiliate) Consumers was obliged to pay the rates established by the MPSC. Mikelonis Aff. ¶¶46, 49, C.A. App. 122-123, 124-126.

9. The defendant in *Associated General Contractors* asserted both that plaintiff lacked antitrust standing and that the conduct alleged was immune from antitrust attack under the labor exemption. (Cont'd)

It further cited to and relied upon Second Circuit jurisprudence that supported the conclusion that Indeck failed to allege antitrust injury. The Sixth Circuit's holding on antitrust injury and standing thus was entirely unremarkable, concluding that petitioner was complaining only about harm to itself, not to competition, and that its alleged damages were too indirect and speculative to support antitrust standing. As explained by one of the cases on which petitioner relies, *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256 (CA 3 1998) (Pet. at 23):

> *Brunswick* tells us to intensify our focus and consider not only the fact that there may be an agreement which is harming others in the marketplace, but to also ask first whether the alleged injury is really of the type that the antitrust laws were intended to prevent, and, as part of that assessment, whether the injury flows from that which makes defendants' acts unlawful.

Id. at 266.

Few areas of antitrust law are as well settled as the antitrust injury and antitrust standing requirements. These requirements are critical to rationalizing the private enforcement of antitrust, especially given the temptation of

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(Cont'd)

While this Court did not deal with the exemption issue, it did observe that ". . .the [plaintiffs'] most specific claims of injury involve matters that are not subject to review under the antitrust laws." 459 U.S. at 526. That same situation obtains here, where the Sixth Circuit, while not reaching the state action defense, recognized that the district court had dismissed the complaint on the basis of the state action defense as well as lack of standing. Pet. App. 32a.

competitors to seek to use the antitrust laws to prevent hard competition and to recover for injury to a competitor, rather than competition. *See* William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445 (1985); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221 (1989); and Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).

On four occasions, this Court has had to correct attempts by lower courts to limit the antitrust injury doctrine: *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Since *Atlantic Richfield*, however, the lower courts have understood antitrust injury and, as shown below, applied its requirements consistently, as the Sixth Circuit did in this case.

Petitioner has failed to identity meaningful deviations in the consistent line of cases dismissing antitrust complaints for lack of antitrust injury. Petitioner places principal reliance on two of this Court's opinions, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), and *Kansas v. Utilicorp United Inc.*, 497 U.S. 199 (1990). Pet. at 15-16. *Otter Tail Power* was decided four years *before* the antitrust injury doctrine was first enunciated in *Brunswick*, and involved a suit by the United States, which, unlike private plaintiffs, does *not* have to show antitrust injury. *Kansas v. Utilicorp* likewise did not address the antitrust injury doctrine, but rather applied the doctrine of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), to prevent indirect-purchasing consumers

from seeking to recover an overcharge imposed on a public utility. Neither of those cases creates any tension with this Court's antitrust injury cases and the many lower court opinions applying them.

The consistency with which the lower courts have applied the antitrust injury requirement is manifest from petitioner's failure to identify any material differences in judicial holdings. Petitioner points principally to the Third, Seventh and Eleventh Circuits (Pet. 22-28). In fact, all three circuits are in harmony with Sixth Circuit law.

For the Third Circuit, petitioner gives greatest weight to two cases involving electric utilities, *Schuylkill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (CA 3 1997), *cert. denied*, 522 U.S. 977 (1997), and *City of Pittsburgh v. West Penn Power Co.*, *supra*. Pet. at 22-23. In both cases, however, the Third Circuit found that antitrust injury *was absent*, just as the Sixth Circuit did here. Like Indeck's complaint, the complaint in *City of Pittsburgh*, was full of the incantations of antitrust. The Third Circuit court was not persuaded by the words, but drilled down to the heart of the claims, stating that:

> . . . our courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon *the presence of a factual situation which is or is not justiciable*. We do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.

Id. at 263. (Emphasis added.)

There, plaintiff alleged that the defendant utilities violated the antitrust laws by their proposed merger, which would have eliminated one of the utilities as a potential low-cost supplier to a redevelopment area in Pittsburgh. The district court's dismissal for lack of antitrust injury was affirmed by the Third Circuit, which held that the comprehensive regulatory framework in which both utilities operated restricted their competitive environment and that this regulatory background was an important factor in assessing whether plaintiff suffered antitrust injury. The court focused on the "realities of the regulated environment in which [plaintiff and the two defendants] were actors." *Id.* at 265. The same kind of regulatory environment forms the background of Indeck's allegations here.[10]

Petitioner also seeks support from *Angelico v. Lehigh Valley Hospital Inc.*, 184 F.3d 268 (CA 3 1999) (Pet. at 23), but that case is readily distinguishable. There the court held that a physician had standing to challenge a group boycott (a *per se* Sherman Act violation), that was preventing him from "competing in the market and thereby earning a living." *Id.* at 274. The court noted that the removal of plaintiff from the marketplace will cause "higher costs or poorer treatment" — the traditional results of anticompetitive behavior. That is not what Indeck complained of here, where its grievance

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10. *See also Alberta Gas Chemicals, Ltd. v. E.I. Du Pont de Nemours & Co.*, 826 F.2d 1235, 1243 (CA 3 1987), *cert. denied*, 486 U.S. 1059 (1988) (no antitrust injury when competitor complained that a rival's acquisition prevented it from increasing sales, since the plaintiff's harm could have occurred without the merger; "The antitrust laws . . . do not award damages or equitable relief for losses stemming from the failure of a competitor to bring about an increase in demand and price").

was that too much competition has injured it. In that regard, the court in *Angelico* specifically stated:

> This is not a case . . . in which we grant standing to a competitor *who was simply harmed by strong competition*. Rather, Angelico has asserted facts indicating that he was harmed by a conspiracy with an illegal anticompetitive intent."

Id. at 275. (Emphasis added.)[11]

For the Seventh Circuit, petitioner relies primarily on *City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (CA 7 1980), *cert. denied*, 449 U.S. 1096 (1981). But there the court gave only perfunctory attention to antitrust injury in a brief discussion that failed to cite a single case. The issues on appeal were the ability of defendant to rely on the *Noerr-Pennington* doctrine and the substantive law of price squeezes. The court's holding on the latter point is severely undermined by the First Circuit's decision in *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (CA 1 1990). There, then Chief Judge Stephen Breyer, writing for a unanimous court, held that allegations of an illegal price

11. In recently dismissing a monopolization complaint for want of antitrust injury, a district court in the Third Circuit construed *Angelico* as follows: "Angelico concerned a surgeon excluded from the cardiothoracic surgery market by a boycott and conspiracy among hospitals and physician groups . . . Angelico is inapposite because the conspiracy was among rival physicians conspiring with hospitals to prevent plaintiff from competing with them." *Precision Surgical, Inc. v. Tyco Int'l, Ltd.*, 111 F. Supp. 2d 586, 590 (E.D. Pa. 2000) (citation omitted). *Brader v. Allegheny General Hospital*, 64 F.3d 869 (CA 3 1995), also relied upon by petitioner (Pet. 24) involved a similarly distinguishable claim of a horizontal conspiracy among health care professionals to boycott a rival physician.

squeeze against defendant were not legally sustainable because of the regulatory environment in which defendant operated: ". . . a price squeeze in a fully regulated industry such as electricity will not normally constitute 'exclusionary conduct' under Sherman Act §2." *Id.* at 28.[12]

Petitioner's citation to *Fishman v. Estate of Wirtz*, 807 F.2d 520 (CA 7 1986) (Pet. at 26) also is unavailing. That case raised the narrow question of whether the antitrust laws protect competition to acquire a natural monopoly and answered it in the affirmative. *Id.* at 533. That unique context for contemplating standing and antitrust injury says nothing about the application of those concepts in normal situations (where, for instance, consumers would be harmed were there an antitrust violation).

In fact, a whole series of Seventh Circuit cases demonstrates that court's endorsement of mainstream standing and injury law. Thus, in *Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F.2d 667 (CA 7 1992), the Seventh Circuit noted that this Court's rulings in *Atlantic Richfield*, *Cargill* and *Brunswick*, require "every plaintiff to show that its loss comes from acts

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12. Chief Judge Breyer also participated in the First Circuit's affirmance of the dismissal of an antitrust suit brought by a discontinued juice distributor against a juice manufacturer because plaintiff had not demonstrated injury to competition, only injury to itself. *R.W. International Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487 (CA 1 1994). The Court said: "Heavy-handed competitive tactics alone do not constitute an antitrust violation . . ." and went on to cite this Court's language in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341: "It is in the interest of competition to permit dominant firms to engage in rigorous competition, including price competition." 13 F.3d at 487, 488.

that reduce output or raise prices to consumers." *Id.* at 670. This decision was followed in *Stamatakis Industries, Inc. v. King*, 965 F.2d 469, 471 (CA 7 1992), where dismissal of an antitrust complaint was affirmed for lack of antitrust injury (". . . as in *Brunswick*, the plaintiffs' complaint is too much competition (injuring producers) rather than too little (injuring consumers.")).

To like effect is the Seventh Circuit's decision in *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins. Co.*, 784 F.2d 1325 (CA 7 1986), *reh'g denied*, 788 F.2d 1223 (1986). There, a group of 80 hospitals sued under the antitrust laws to enjoin Blue Cross/Blue Shield from forming its own preferred provider organization. The Seventh Circuit affirmed the district court's denial of a preliminary injunction. In a scholarly analysis of antitrust injury, the court found that plaintiffs — like Indeck here — were not championing vigorous competition, but really were only seeking to protect their own economic turf.

> When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust.
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> * * *
>
> The books contain examples of firms that invoke the antitrust laws to obtain shelter from competition rather than to promote competition.
>
> * * *

> Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals — sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. *These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds.* The antitrust laws are for the benefit of competition, not competitors.

Id. at 1334 and 1338. (Emphasis added.)

Other Seventh Circuit cases to like effect are *Ehredt Underground v. Commonwealth Edison Co.*, 90 F.3d 238, 240 (CA 7 1995), *cert. denied*, 519 U.S. 1056 (1997) ("Over and over, we stress that antitrust is designed to protect consumers from producers, not to protect producers from each other or to ensure that one firm gets more of the business."); *O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565 (CA 7 1994); *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (CA 7 1993), *cert. denied*, 510 U.S. 111 (1994); and *Israel Travel Advisory Serv., Inc.*, 61 F.3d 1250 (CA 7 1995), *cert. denied*, 517 U.S. 1220 (1996) (the court emphasized that the antitrust injury doctrine has its very basis in the notion that "acts harmful to business rivals generally help consumers," citing *Brunswick*. *Id.* at 1256).

For the Eleventh Circuit, petitioner relies heavily on *Key Enterprises of Delaware v. Venice Hospital*, 919 F.2d 1550 (CA 11 1990) (Pet. at 27-28), but fails to disclose that the Eleventh Circuit vacated this opinion, 979 F.2d 806 (CA 11 1992), and then, because the case had been settled, ordered the appeal and the complaint dismissed, 9 F.3d 893 (CA 11 1993), *cert. denied*, 511 U.S. 1126 (1994).

The still-valid Eleventh Circuit case discussed by petitioner, *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 934 F.2d 1493 (CA 11 1991), is of no assistance to it. The court held plaintiffs had standing to challenge a horizontal agreement among a score of rural electric cooperatives to cause the enactment of legislation to divide Alabama into territories and restrict the service areas of plaintiff municipal corporations (but the conduct was nevertheless found to be antitrust-immune state action). The court found a "close relationship between the Cities' claimed injury and the alleged antitrust violation," since the questioned legislation banned them from areas where they had competed. *Id.* at 1500. The legislation would "directly injure" plaintiffs, so they were "an efficient enforcer of the antitrust laws", which is a separate requirement. *See Florida Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (CA 11 1997), *cert. denied*, 522 U.S. 913 (1997). A horizontal boycott case directly restricting the geographic scope of plaintiffs' competition teaches little about a complicated fact pattern where a utility charges government-approved rates and enters into government-approved purchase and sale arrangements. The real Eleventh Circuit lesson, which was valid before and after *Municipal Utilities*, is that injuries conferring antitrust standing must "coincide with the public detriment tending to result from the alleged violation." *Florida Seed*, 105 F.3d at 1375 (citation omitted). Petitioner's claimed injuries do not pass this test.[13]

Other Circuits have followed the same principles that guided the Sixth Circuit here. *See, e.g., Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 486 (CA D.C. 1996)

13. *See also Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (CA 11 1991) (excluded competitor denied standing because it was not the most efficient enforcer of the antitrust laws).

("appellant must allege facts that would show an anticompetitive impact on the market as a whole"); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 766-67 (CA 2 1995), *cert. denied*, 516 U.S. 944 (1995); (distributors who lost distribution rights through alleged predation lacked antitrust standing because those rights could have been simply terminated, without recourse); *Eichorn v. AT&T Corp.*, 2001-1 CCH Trade Cases ¶73,241 (CA 9 2001) (an antitrust injury must reflect an activity's anti-competitive effect on the competitive market); *McDaniel v. Appraisal Institute*, 117 F.3d 421 (CA 9 1997) (plaintiff must show injury to competition, not simply injury to itself); *Legal Economic Evaluations, Inc. v. Metropolitan Life Insurance Co.*, 39 F.3d 951, 954 (CA 9 1994), *cert. denied*, 514 U.S. 1044 (1995) ("Exclusion of a competitor may be a necessary condition to finding that a group boycott or refusal to deal violates the antitrust laws, but it is not a sufficient condition for finding antitrust injury").

In addition to its strained reading of the case law, petitioner also mischaracterizes the Sixth Circuit's holding. It claims that the Sixth Circuit held that only consumers have antitrust standing. Pet. at 18. The Sixth Circuit made no such holding, but instead merely found that injury to a competitor, without injury to competition, will not support standing. In so ruling, the court was well within the mainstream of an unusually well-settled part of antitrust law. Petitioner does not dispute this, conceding that, under this Court's precedents, to establish antitrust injury a plaintiff must plead facts showing "a competition-reducing aspect or effect of the defendant's behavior," and that a plaintiff may not assert antitrust injury "based merely on profits the plaintiff lost when a defendant reduced its prices, even if the defendant's goal was to drive out competition." Pet. at 14.

Having conceded these points, petitioner nevertheless ignores the case it sought to present in the courts below, where it essentially alleged no more than that it had lost out in a competitive bidding war over who would sell electricity to a GM plant in a totally regulated environment. In this Court, petitioner barely mentions that competitive battle, completely ignores that regulatory environment and instead attempts to reinvent its case to focus on an alleged refusal by Consumers to provide petitioner with so-called "essential services" (again totally ignoring the pervasive regulatory environment — state and federal — that applied to them). But all of those services had importance to petitioner only if it first obtained GM as its customer. Petitioner surely was not interested in purchasing stand-by energy or in the means to transmit it unless it had a customer to whom it would be sold. And, because petitioner had no contracts with the large industrial customers who entered into limited-term discount contracts with Consumers, any alleged harm to petitioner was therefore entirely speculative, as the Sixth Circuit correctly held.

The Sixth Circuit, like the others who have spoken on the issue, has consistently applied the factors established by this Court to determine antitrust injury and standing. It did so in the decision below, which conflicts neither with this Court's precedents nor with the applicable case law in the other circuits.

2. Independent Grounds Support the Decision Below.

Because of its ruling on antitrust injury and standing, the court of appeals found it unnecessary to reach the principal basis upon which the district court relied in dismissing Indeck's complaint: all of the conduct complained of was subject to the state action doctrine. Applying the two-

prong analysis that this Court established in *Midcal*[14], the district court held that . . . "Michigan has clearly articulated a policy to displace unfettered competition and replace it with a regulatory system . . ." and that "Michigan, through the MPSC, actively supervised independent contracts and the introduction of competition among electrical providers." Pet. App. 19a, 22a.[15] Thus, consideration of the antitrust injury issue raised in the petition will not dispose of this litigation and therefore has no practical importance.

3. The Conduct of Which Indeck Complains Was the Subject of Lengthy and Complex Proceedings Before the MPSC and the Michigan Courts or Was Otherwise Subject to Administrative Remedies.

The thrust of Indeck's case below was the subject of numerous administrative and judicial proceedings in Michigan — proceedings never disclosed in the petition.

- The contract between Consumers and GM was approved in its entirety by the MPSC, which reaffirmed its approval upon rehearing

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14. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

15. Several circuits have recently rejected, on state action grounds, similar suits by cogenerators against regulated public utilities. *See TEC Cogeneration, Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (CA 11 1996), *amended*, 86 F.3d 1028 (1996); *Nuggett Hydroelectric v. Pacific Gas & Electric Co.*, 981 F.2d 429 (CA 9 1992), *cert. denied*, 508 U.S. 908 (1998); *Schuykill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (CA 3 1997), *cert. denied*, 522 U.S. 977 (1997).

requested by the Michigan Attorney General.[16] The Michigan Court of Appeals affirmed the MPSC and the Michigan Supreme Court denied leave to appeal.[17]

• Each of the other discount contracts between Consumers and 17 of its existing customers was approved by specific orders of the MPSC.

• The amount of power procured by Consumers from all cogenerators, whether affiliates like MCV or non-affiliates like Indeck, and the rates to which these suppliers were entitled, were all determined by the MPSC, whose orders were affirmed by the Michigan courts.

• All of the allegedly exclusionary conduct was subject to detailed regulation by the MPSC and FERC. Both agencies provide administrative remedies for aggrieved parties, yet Indeck made no claim that it exhausted (or, indeed, even pursued) such remedies.

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16. The Michigan Attorney General, an elected official and long an opponent of the utility industry in Michigan, filed amicus briefs in the district court and the court of appeals, arguing that respondents should not be entitled to rely on the state action defense, but took no position on the antitrust injury issue. The MPSC, which under Michigan law has exclusive jurisdiction over public utilities, did not join in those briefs. Recently, the Michigan Court of Appeals ruled that the Attorney General could not both represent the MPSC and oppose it on the same issue, as had been the prior practice. *Attorney General v. MPSC*, 243 Mich. App. 487 (2000), __ N.W.2d __.

17. *See* footnote 5, *supra*.

In this case, Indeck sought either to relitigate matters it pursued, unsuccessfully, before the MPSC, or sue over matters that both federal and Michigan law delegated to administrative agencies, making entirely academic any further review of the antitrust injury issue.

4. Michigan's Electric Utility Industry Has Been Substantially Transformed Since Indeck Filed Its Complaint.

Michigan, like many other states, is grappling with seismic changes in the business of generating and distributing electricity. While ostensibly pursuing "deregulation," Michigan enacted a new law in June 2000 that radically changes the regulatory landscape for electric utilities. Known as the Customer Choice and Electricity Reliability Act, MCLA 460.10, this statute moots many of Indeck's alleged grievances about the difficulties in competing in Michigan in 1995-1996. The actions about which Indeck complained are now subject to an entirely new set of detailed regulatory requirements. Among other things, this new statute:

- establishes a statutory maximum (30%) for generating capacity that can be under the control of an electric utility in any relevant market (MCLA 460.10f);

- provides for remedies (including divestiture) against a utility which exceeds the 30% limit (MCLA 460.10f);

- requires utilities either to divest ownership of their transmission facilities or to divest complete operational control over them by joining a FERC-

approved regional transmission organization (MCLA 460.10w);

• requires that "merchant plants," like that proposed by Indeck, come under the jurisdiction of the MPSC, and subjects business by them with customers like GM to MPSC regulatory control (MCLA 460.10a(2) and (4); 10c; 10g(a) and (d); 10p(5); 10q(1) and (2); and 10(r));

• changes the rules regarding the obligation of a utility to provide stand-by power (MCLA 10b(4) and (5));

• expressly "grandfathers" the discount contracts described at pages 2-3, *supra* (MCLA 10aa);

• specifically disclaims any intention to upset the power supply arrangements made by Consumers with any supplier, including its affiliate MCV (MCLA 10a(8)); and;

• gives all retail customers the ability to buy power directly from suppliers like Indeck beginning January 1, 2002 subject to the provisions of the act (MCLA 10a(1) and 10a(5)).

Given these enormous changes in Michigan's public utility regulation, the facts alleged in Indeck's complaint will never arise again.

CONCLUSION AND RELIEF

Petitioner Indeck has attempted to relitigate in the federal courts matters that are fully covered by Michigan's utility regulatory scheme, in which it has been an active, but largely unsuccessful, participant. There is no reason for this Court to review the unanimous opinion of the Sixth Circuit. That opinion involved a straight-forward application of established antitrust doctrine. Moreover, further review would neither dispose of the case, because of the alternate basis on which the district court dismissed the complaint, nor address an issue in a live legal context, because the complex regulatory scheme in which the challenged acts occurred has already been superseded by a new statute.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Indeck Energy Services, Inc.,
and Indeck Saginaw Limited Partnership,
Petitioners,

v.

Consumers Energy Company and
CMS Energy Corporation,
Respondents.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Sixth Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit applied an erroneous standard for pleading "antitrust injury" and "antitrust standing"?

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN

The Attorney General of the State of Michigan (Attorney General) respectfully moves for leave to file the instant brief *amicus curiae*[1] in support of Indeck's petition for a writ of certiorari. The Attorney General sought consent of the parties to file the instant brief *amicus curiae*; however, respondents, Consumers Energy Company and CMS Energy Corporation, withheld their consent.[2] The nature of the Attorney General's interest is set forth below.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN

The Attorney General of the State of Michigan respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

Amicus is the duly elected and qualified Attorney General of the State of Michigan and holds such office by virtue of the State Constitution of 1963, art. 5, § 21, and by mandate of the qualified electorate of the state. She heads the Department of Attorney General, which was created by the Executive Organization Act, 1965 P.A. 380, ch. 3; MCL 16.150 *et seq.*, MSA 3.29(50) *et seq.* Michigan law specifically contemplates that the Attorney General may "appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state

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[1] Pursuant to Supreme Court Rule 37(6), the Attorney General recognizes and appreciates the assistance of counsel for petitioners in preparing the instant brief *amicus curiae*.

[2] This brief refers to the petitioners collectively as "Indeck" and the respondents collectively as "Consumers Energy."

may be a party or interested." MCL 14.28, MSA 3.181; *see also Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 791, 262 N.W.2d 676 (1978) (holding that the Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed").

Amicus' interest in this case arises from her role as the principal defender of Michigan citizens' interest in free competition. As stated by this Court in *United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)*:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Holding this same belief, the Attorney General has consistently pursued a policy of combating unlawful and anticompetitive trade practices, and devoting considerable attention to the field of energy competition.[3] The Attorney General has also appeared as an *amicus* in this Court in important matters involving the antitrust laws. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Kansas v. Utilicorp United*, 497 U.S. 199 (1990).

This case is one of a limited number of private suits in which the Attorney General has participated. The Attorney General participated as an *amicus* in the district court proceedings and on appeal, and further participated in closely related proceedings before the Michigan Public Service

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[3] In recent years, the Attorney General has also pursued antitrust allegations in the markets for health care services, pharmaceuticals, children's toys, shoes, telecommunications services, solid waste, and airline transportation.

Commission. As the Commission has recognized, fair competition in electricity markets is essential because "electricity is not just another commodity" – "it is one of life's necessities." *Staff Market Power Discussion Paper*, MPSC Case No. U-11290: Electric Restructuring 12 (June 5, 1998).

The Attorney General accordingly has determined that the interests of the people of the State of Michigan require her to file the instant *amicus curiae* brief urging this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

SUMMARY OF THE ARGUMENT

The purpose of this *amicus* brief is to make three points that establish the substantial importance of this case to the future of competition, both in electricity markets and generally.

First, under this Court's precedents, petitioner Indeck's complaint sufficiently alleges "antitrust injury," defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).[4] Indeck asserts that respondent Consumers Energy has engaged in a variety of anticompetitive activities – including withholding access to transmission facilities and refusing to provide power at reasonable rates – that had the purpose and effect of injuring competition. Those allegations easily satisfy the "antitrust injury" requirement. Although Indeck's complaint also addresses a specific contractual arrangement between Consumers Energy and General Motors Corporation, that contract is not the basis for the complaint.

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[4] The Attorney General does not take a position on whether Indeck's allegations are true. As the petition for certiorari explains, no discovery on that question has yet been permitted. See p. 6.

Second, under this Court's precedents, Indeck has "antitrust standing" – *i.e.*, it is "a proper party to bring [this] private antitrust action." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 n.31 (1983). A competitor injured by the anticompetitive acts of its rivals falls squarely within the class of plaintiffs that may appropriately vindicate the antitrust laws. The Sixth Circuit's contrary holding appears to rest on the erroneous view that the plaintiff must be the *best* possible party to bring the action. In any event, on the allegations of this complaint, Indeck is in fact the best available plaintiff.

Third, the Sixth Circuit's holding that Indeck's complaint does not assert "antitrust injury" or "antitrust standing" has substantial significance. The decision below stands as a considerable obstacle to fair competition at a delicate point in the transition to competitive energy markets in Michigan and other states. Further, on its own terms, the Sixth Circuit's decision is not limited to the context of electricity markets. The Sixth Circuit's broad holding therefore presents a substantial invitation to monopolists and others in a variety of industries to engage in anticompetitive acts towards their rivals.

The petition for a writ of certiorari should accordingly be granted.

ARGUMENT

I. Indeck's Complaint Sufficiently Alleges "Antitrust Injury."

It is well-settled that a private antitrust plaintiff may state a claim only if it has suffered "antitrust injury." That term was defined by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977), as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." In *Brunswick* and subsequent cases, this Court made clear that a plaintiff's lost profits resulting from a rival's aggressive

competition do not constitute "antitrust injury" because the antitrust laws are designed to encourage, not impede, competition. *Id.*; *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986). But this Court has never held that a plaintiff does not suffer "antitrust injury" unless the defendant's activities injure consumers as well.

The injury asserted by Indeck's complaint is of the type the antitrust laws were intended to prevent – in other words, Indeck is not complaining about aggressively competitive acts by respondent Consumers Energy. The thrust of Indeck's complaint is that Consumers Energy has engaged in anticompetitive acts with the purpose and effect of excluding independent power producers (of which Indeck is one) from the market for supplying electricity to large industrial customers.[5] Indeck's complaint specifically asserts that Consumers Energy engaged in a series of activities with an anticompetitive purpose and effect, including refusing to provide customers of independent power producers with stand-by power on reasonable terms (¶ 30); discriminating against independents in the purchase of power (¶ 31); and refusing to provide access to essential transmission facilities (¶ 32). The Sixth Circuit acknowledged several of these allegations (*see* Pet'n for Cert. at 7-8), and Indeck's petition for certiorari collects more than a dozen others (*see id.* at 4-5 & nn.1-2).

Although the Sixth Circuit's decision principally discusses Indeck's allegations regarding Consumers Energy's contracts with General Motors, those allegations are not the focus of the complaint. Instead, as just noted, Indeck complains about the anticompetitive exclusion of itself and other independents from the market for large industrial customers. Even those

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[5] The complaint refers to these customers as "the Relevant At Risk Market."

portions of the complaint that discuss the General Motors contracts reinforce this point. *E.g.*, ¶ 28 (alleging that Consumers Energy "ultimately frustrated the successful realization of the Saginaw and Flint Projects *and other independent power projects*" (emphasis added)). Further, Indeck's allegation is not that Consumers Energy offered discounted prices to General Motors (an allegation that, absent predatory pricing, would be insufficient under the *Brunswick* line of cases) – instead, Indeck asserts that Consumers Energy conditioned the lower prices on General Motors' agreement not to deal with independents and simultaneously raised Indeck's cost of doing business. Moreover, Indeck alleges that Consumers Energy "is not motivated by efficiency concerns, but instead, reflects its willingness to sacrifice short run profits for a long run exclusionary impact on competitive rivals such as Indeck." (¶ 51). If true, this is precisely the type of conduct the antitrust laws were intended to prevent.[6]

Because Indeck's complaint asserts that Consumers Energy engaged in anticompetitive activities, and furthermore asserts that Indeck was injured as a result of those anticompetitive activities, the Sixth Circuit erred in holding that Indeck failed to assert "antitrust injury."

II. Indeck's Complaint Sufficiently Alleges "Antitrust Standing."

As to Indeck's allegations regarding the General Motors contract, the Sixth Circuit suggested that Indeck lacked "antitrust standing" – *i.e.*, that Indeck was not "a proper party to bring [this] private antitrust action." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 n.31 (1983). That conclusion is not supportable. A plaintiff injured by the anticompetitive acts of

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[6] Indeck would, of course, have to establish not only its standing to sue, but also the substantive requirements of its alleged antitrust claims.

its rival is uniquely well-situated to vindicate the interests protected by the antitrust laws.

Even if the Sixth Circuit was correct in concluding that a consumer would also have antitrust standing, that does not mean that Indeck does not. Other circuits have consistently so held. *E.g.*, *Illinois ex rel. Ryan v. Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000) ("normally only consumers *or* competitors have [antitrust] standing" (emphasis added)); *S.D. Collectibles v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) ("The antitrust laws were designed to protect competition and therefore standing is generally limited to actual market participants, that is, competitors *or* consumers." (emphasis added)). Indeed, Indeck rightly points out that there is substantial doubt regarding whether a consumer would bring such a claim. That is particularly true when, as in this case, the consumer arguably benefited from lower prices in the short term.

The Sixth Circuit thus erred in holding that Indeck lacks "antitrust standing" as to the allegations regarding General Motors.

III. The Decision Below Has Substantial Continuing Significance.

Certiorari is also warranted given the importance of this case to competition, both with respect to energy markets and also more generally. The decision below comes at a nascent period in the development of electricity competition in Michigan, in the other states comprising the Sixth Circuit, and throughout the nation. "Competition in the electric marketplace in Michigan remains in its infancy." Michigan Public Service Commission, *Status of Electric Competition in Michigan* 7 (Feb. 1, 2001). The instant case is an important case regarding the ability of public utilities to obstruct the ability of independent power producers to enter energy markets.

The Sixth Circuit's holding that Indeck may not sue to vindicate the interests of the antitrust laws thus has the potential to impede the transition to free competition. As Michigan's Public Service Commission recognized in the very first sentence of its report on competition in electricity markets, because two utilities (Consumers Energy and Detroit Edison) "together control[] nearly ninety percent of electricity sales in Michigan, market power is a significant concern as the State moves forward to establish a competitive generation market for electricity." *Staff Market Power Discussion Paper*, MPSC Case No. U-11290: Electric Restructuring 1 (June 5, 1998). The Commission concluded its report by stating that, "successful restructuring of Michigan's electric industry to establish a robust competitive market may well hinge upon the ability to effectively mitigate market power. . ." *Id.* In fact, Michigan is accordingly now undertaking to "provide[] incentives for non-utility entrants in the Michigan electric marketplace," to "permit the introduction of competition to continue." *Status of Electric Competition in Michigan*, *supra*, at 7 (Feb. 1, 2001). Such a competitive electric market is essential in Michigan in order to avoid the "worst of all worlds," a transition from regulated electric monopolies to unregulated electric monopolies. *See Staff Market Power Discussion Paper*, *supra*, at 67. The Sixth Circuit's holding has the substantial potential to impede the

State of Michigan's effort in trying to safely navigate that transition.[7]

Moreover, it bears noting that the Sixth Circuit's decision is not limited to the context of electricity markets. The Sixth Circuit appears to have held that competitors may not bring suit on the basis of injuries suffered by themselves alone. Such a holding presents a substantial invitation to monopolists and others to engage in anticompetitive conduct towards their rivals in an array of markets.

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[7] The issues raised by Indeck's complaint are indisputably substantial in the transition to competition. "Without adequate transmission, new suppliers are unable to secure and deliver power to their customers." *Status of Electric Competition in Michigan*, *supra*, at 5. In addition, in certain circumstances, exclusive power contracts "are designed to lock customers in to long-term commitments, forestalling competition and discouraging new entrants from entering the market." *Staff Market Power Discussion Paper*, *supra*, at 64.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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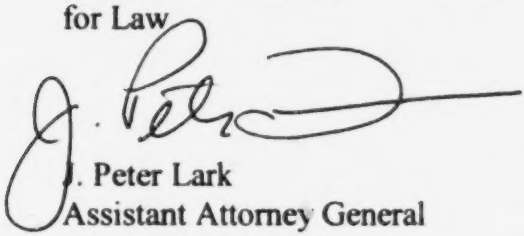

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IN THE

Supreme Court of the United States

Indeck Energy Services, Inc.,
and Indeck Saginaw Limited Partnership,
Petitioners,

v.

Consumers Energy Co. and
CMS Energy Corporation,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Note: On May 16, the Sixth Circuit ordered that its decision in this case be published and accorded precedential status.

ARGUMENT

As demonstrated by the petition and the *amicus curiae* brief of the Michigan Attorney General, the decision below announces standards for applying "antitrust injury" and "antitrust standing" doctrines that conflict with decisions of this Court and other circuits. Respondent's contrary arguments – principally that the energy market is heavily regulated – are unavailing. Moreover, the question is of great importance because the decision below will impede the critical transition to free energy markets. Certiorari accordingly should be granted.[1]

I. Certiorari Should Be Granted to Review the Sixth Circuit's Antitrust Injury Holding.

1. This Court's precedents establish that (i) petitioner's complaint seeks damages for the anticompetitive aspects of respondent's activities, and (ii) petitioner accordingly has alleged "antitrust injury." There accordingly is no basis for respondent's bald assertion (BIO 15) that petitioner seeks to recover for "too much competition."

Petitioner's complaint alleges that petitioner was injured by respondent's refusal to provide reasonable access to essential transmission facilities and back-up power, and by respondent's further refusal to purchase power from petitioner in an effort to place petitioner in a price-cost squeeze. See Pet. 2-4.[2] Under this Court's precedents, those acts plainly are anti-, not pro-, competitive. See Pet. 15-16 & n.7 (collecting cases). Respon-

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[1] We reiterate the recommendation of the petition (at 1) that the reader would benefit substantially by first reviewing the bolded allegations of the complaint relating to antitrust injury and antitrust standing (see Pet. App. 42a-62a).

[2] Respondent's claim that "the principal focus" of petitioner's complaint was respondent's contracts with General Motors (BIO 1) is belied by the complaint (see Pet. App. 42a-62a) and, even if true, would lack legal significance.

dent asserts only (BIO 12) that these decisions did not involve any question of antitrust injury. That is not only wrong – see Pet. 16 (discussing the holding of *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199, 204 (1990), that "only the utility has the cause of action because it alone has suffered injury within the meaning of" the antitrust laws) – but it is also irrelevant. The point of those decisions is simply the uncontestable proposition that this Court has held that activities of the sort that underlie petitioner's claimed injury are anticompetitive.

Given that petitioner complains of the anticompetitive aspects of respondent's conduct, petitioner satisfies the "antitrust injury" requirement announced by this Court's precedents. The "antitrust injury" doctrine first announced in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), simply holds that an antitrust plaintiff's injury must be "attributable to an anticompetitive aspect of the practice under scrutiny." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990). See also *Brunswick*, 429 U.S. at 489 ("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."). For example, even if a defendant's conduct violates the antitrust laws, a plaintiff is not permitted to recover for injuries arising from *enhanced* competition, such as the enhanced efficiencies produced by a merger that may reduce the plaintiff's income. Because petitioner's complaint does not seek recovery on such a basis – indeed, not even the *Sixth Circuit* suggested that it does – the conflict between the decision below and this Court's precedents is plain.

2. Although the Sixth Circuit acknowledged the *Brunswick* standard for alleging "antitrust injury," it nonetheless imposed *three* additional substantive requirements that conflict with the holding of this Court and other circuits that an "antitrust injury" is simply one that reflects the anticompetitive nature of the defendant's activities. Cf. *Major League Baseball Players Ass'n* v. *Garvey*, 121 S. Ct. 1724, 1728 (2001) (per curiam) ("To be sure, the Court of Appeals here recited these principles, but its application of them is nothing short of baffling.").

First, the Sixth Circuit held that an antitrust plaintiff must allege that the defendant's activities eliminated the plaintiff from the marketplace. Pet. 8. Respondent cannot, and does not, attempt to dispute this aspect of the court's holding. See Pet. App. 6a (requiring allegation of "exclusion of the competitor from the marketplace"), 8a (petitioner failed to allege "that all other unsuccessful bidders for Consumers Energy's business were driven out of the market").

Second, the Sixth Circuit held that an antitrust plaintiff must allege that the defendant's activities actually reduced competition. See Pet. 9; see also Pet. App. 7a (requiring allegation "that a less-than-arm's length transaction destroyed or damaged the competitive environment in power generation"). Respondent embraces this requirement, although it mistakenly asserts that the court found petitioner's complaint insufficient in this regard. BIO 8. In reality, as the petition repeatedly details but respondent ignores, the court of appeals acknowledged petitioner's allegations that respondent's activities reduced competition four different times. See Pet. 7-8; see also *id.* at 5 & nn.1-2 (collecting numerous examples from petitioner's complaint).

Third, the Sixth Circuit extended its holding that an antitrust plaintiff must allege that the defendant's activities reduced competition to *further* require that the plaintiff allege that the defendant's conduct harmed consumers. See Pet. 9-11. It was on this basis that the court found that petitioner had failed to allege "antitrust injury." See Pet. App. 6a ("Although antitrust actions may, of course, be initiated by marketplace competitors, those actors in the economic forum must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative."; petitioner failed to allege "how General Motors itself was harmed or how other customers in the energy market suffered"), 8a ("Indeck has alleged only injury to itself * * * not injury to the customers").[3]

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[3] A perfect example of the Sixth Circuit's misguided approach to "antitrust injury" is its reasoning (on which respondent relies (BIO 8)) that the contracts between respondent and General Motors would not disrupt the long-term competitive environment for energy supplies. See Pet. App. 7a. The Sixth

3. The Sixth Circuit's decision conflicts not only with this Court's precedents (see *supra* at 1-2), but also with decisions of other circuits that would find "antitrust injury" in this case. See Pet. 22-29. Not even respondent disputes the core of the conflict: that other circuits do not require a plaintiff to allege anything other than that its injuries arise from the anticompetitive effects of the defendant's acts.

Respondent notes that in two cases "the Third Circuit found that antitrust injury *was absent*," but misstates the court's holding as resting on "the comprehensive regulatory framework in which both utilities operated." BIO 13-14 (emphasis in original). In reality, the Third Circuit found antitrust injury lacking not because the parties were "regulated" but because in those cases, unlike this one, the plaintiff and defendant were forbidden *by law* from competing *at all* and the only competitive restraint arose from the government's regulation rather than the defendants' conduct.[4] The decision below conflicts with the Third Circuit's precedents because that court has squarely rejected the Sixth Circuit's view that a plaintiff must allege that the defendant's conduct injured consumers, and indeed has rejected that view in cases involving regulated energy markets. See Pet. 22-23. Respondent's further argument (BIO 14) that *Angelico* v.

Circuit's description of the contracts is factually inaccurate (see Pet. App. 51a-52a (complaint)), but the relevant point is that its analysis has nothing to do with "antitrust injury" – *i.e.*, whether petitioner complains about an anticompetitive aspect of respondent's conduct. To the extent that the Sixth Circuit's point is relevant at all to this case, it goes to whether petitioner can prove the substance of its case, not preliminary issues such as injury and standing.

[4] See *City of Pittsburgh* v. *West Penn Power Co.*, 147 F.3d 256, 269 (CA3 1998) ("[I]t is the structure of the regulated industry, not the defendants' conduct, which creates the lack of competition – and under these facts – the lack of antitrust standing. That does not mean that utilities are immune from antitrust liability. * * * * Had the ability of the utilities to serve various customers in various regions not been subject to approval of the PUC, our standing analysis would be radically different."); *Schuykill Energy Resources* v. *Pennsylvania Power & Light Co.*, 113 F.3d 405, 415 (CA3) ("In addition to the fact that the Agreement on its face defeats SER's claim that it is PP&L's competitor, state and federal laws prohibit SER from competing in the relevant market."), *cert. denied*, 522 U.S. 977 (1997).

Lehigh Valley Hospital, 184 F.3d 268 (CA3 1999), is distinguishable because that case involved "a *per se* Sherman Act violation" has already been squarely rejected by this Court. See *Atlantic Richfield*, 495 U.S. at 343 ("The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason. * * * Thus, 'proof of a per se violation and of antitrust injury are distinct matters that must be shown independently.' P. Areeda & H. Hovenkamp, Antitrust Law para. 334.2c, p. 330 (1989 Sup.).").

Regarding the Seventh Circuit, respondent's argument (BIO 15) that the precedential force of *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976 (CA7 1980), has been "severely undermined" by a First Circuit decision that does not cite it and that addresses an entirely different issue (*Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17 (CA1 1990)) speaks for itself. *Mishiwaka* stands for the proposition that a plaintiff asserts antitrust injury when its complaint alleges a price-squeeze claim in energy markets such as presented by this case. See Pet. 25. Nor does respondent even attempt to explain its erroneous argument regarding *Fishman* v. *Estate of Wirtz*, 807 F.2d 520 (CA7 1986), that the Seventh Circuit's holding the "antitrust injury" requirement does not mandate an allegation of *consumer* injury (in accord with the Third Circuit but in conflict with the Sixth Circuit) turned on the fact that the defendant in that case held a "natural monopoly."

Regarding the Eleventh Circuit, respondent would distinguish *Municipal Utilities Board of Albertville* v. *Alabama Power Co.*, 934 F.2d 1493 (CA11 1991), because that case (in supposed contrast to this one) did not involve "a complicated fact pattern where a utility charges government-approved rates and enters into government-approved rates and enters into government-approved purchase and sale agreements." BIO 19. We address *infra* at 6-7 the question whether this alleged regulatory environment is relevant given the procedural posture of this case (answer: no), but for now it is sufficient to point out that the Sixth Circuit did not rely *in any respect* on the distinctions re-

spondent purports to identify, which are not mentioned in either the background or analysis section of the decision below. Even giving respondent the full force of its argument (far more than it is due), not even the brief in opposition denies that the Sixth and Eleventh Circuits have adopted squarely conflicting decisions (with the resultant inconsistent applications of federal law) regarding whether a competitor must allege consumer injury in order to bring an antitrust claim. See Pet. 26-27.

4. Respondent's principal argument in opposition – that this case arises in a regulated environment (see BIO 1-10) – is irrelevant – so irrelevant that (a) the Sixth Circuit did not rely on it in any respect, (b) respondent did not make any such argument below, and (c) no other court has adopted it.[5]

Respondent does not contend that the regulatory proceedings it cites addressed whether its conduct complied with the federal antitrust laws, or even that the specific anticompetitive acts at issue here were approved by state officials. The relevant point for purposes of the "antitrust injury" requirement is that respondent admits that, notwithstanding that energy markets are regulated, petitioner and respondent compete to sell power to large industrial customers. See BIO 4 (acknowledging that "these large-load customers began to consider other sources for obtaining electricity" and "made it clear that they * * * would explore other options"). As such, petitioner has properly asserted "antitrust injury" so long as it seeks to recover for the anticompetitive aspects of respondent's actions, which it does. See *supra* at 1-2.

The precedents cited in the brief in opposition establish that the degree of government regulation relates to the question whether a defendant's activities are immune from liability as "state action" under the test of *California Retail Liquor Dealers*

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[5] To demonstrate that respondent did not make any such argument below, we are lodging the four-page section of respondent's court of appeals brief that defended the district court's antitrust injury holding. Of note, respondent expressly acknowledged that the singularly self-serving "affidavit" of its General Counsel (Mr. Mikelonis) was presented only as "a useful guide to the materials" presented to "establish its state action defense." Resp. C.A. Br. 41.

Ass'n v. *Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980) ("*Midcal*") (inquiry is whether (i) state policy is clearly articulated and (ii) state actively supervised challenged activities), not whether the plaintiff has alleged "antitrust injury." The courts consistently separate their "state action" and "antitrust injury" inquiries, and respondent is accordingly unable to cite any court finding that a regulated market (such as the energy market) is subject to a unique antitrust injury standard. See, *e.g.*, *Nugget Hydroelectric, L.P.* v. *Pacific Gas & Elec. Co.*, 981 F.2d 429, 435 (CA9 1992), *cert. denied*, 508 U.S. 908 (1993), *cited in* BIO 22; *Municipal Utils. Bd. of Albertville* v. *Alabama Power Co.*, 934 F.2d 1493, 1498-1505 (CA11 1991), *cited in* BIO 19; *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1446-62 (CA11 1991), *cited in* BIO 19.

Respondent's related claim that certiorari is not warranted because it is entitled to prevail on the alternative ground of state action immunity is unfounded. The Sixth Circuit made clear that it was not reaching that question (Pet. App. 2a), which accordingly would remain open for consideration on remand. In any event, as the State Attorney General explained in her brief as an *amicus curiae* in the Sixth Circuit (lodged with this Reply), respondent cannot satisfy the *Midcal* inquiry on these facts.

5. Certiorari is furthermore warranted because the decision below, which has precedential force as a result of the Sixth Circuit's decision ordering publication, is of surpassing importance.

Respondent's seriously overstated claims regarding recent changes in the regulatory environment would not, even if true, render the Sixth Circuit's holding "academic." Contra BIO 24. That competition is expanding, not contracting, means that power monopolies will have more, not fewer, opportunities to leverage their entrenched control over inputs such as transmission facilities, as well as their high-volume purchases and sales of electricity. In the meantime, the fact that electricity customers pay rates fixed by regulation (see BIO 3) just heightens the importance of this case: the fact that changes in market conditions do not change consumers' costs means that an antitrust plaintiff *cannot* allege (as the Sixth Circuit required) that the

defendant's conduct causes consumer injury. Cf. Pet. 21 (providing example of competitors selling widgets at fixed price of $5 per unit). The decision below accordingly gives monopolists such as respondent a free pass to engage in anticompetitive acts.

Moreover, as detailed in the Michigan Attorney General's brief, the decision below comes at an *exceedingly* delicate point in the transition to competitive energy markets. See generally A.G. Br. 7-9. The Sixth Circuit nonetheless adopted an unprecedented standard for alleging antitrust injury, imposing a higher standard for alleging "antitrust injury" than for pleading the *substance* of petitioner's antitrust allegations (see Pet. 20-21), a point respondent notably never contests. By all but immunizing entrenched power monopolies from antitrust claims, the Sixth Circuit's decision presents a direct challenge to that transition by means that include creating a substantial deterrent to would-be market entrants. For it is federal antitrust law that provides the principal guarantee of fair market access as state public utility commissions withdraw from their regulatory role.[6]

Moreover, respondent ignores the fact that the Sixth Circuit's decision is not limited to the context of energy markets. The court broadly held that *any* plaintiff challenging its rival's activities under the antitrust laws must allege that the defendant's acts eliminated the plaintiff from competition, harmed competition generally, and harmed consumers as well. See *supra* at 3.

Certiorari accordingly should be granted to review the "antitrust injury" standard adopted by the Sixth Circuit.

II. Certiorari Should Be Granted to Review the Sixth Circuit's Antitrust Standing Holding.

This Court's precedents, consistently applied by other circuits, establish that petitioner has "antitrust standing" as a com-

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[6] Even if the Sixth Circuit's decision had been limited to petitioner's allegations regarding co-generation, it would have been of substantial importance. The decision directly undermines competition in the provision of energy to large industrial customers in several major industrial states within its jurisdiction, including Michigan, Ohio, and Kentucky.

petitor directly injured by respondent's anticompetitive acts. The conflict could not be more transparent, given that respondent does not deny or defend the Sixth Circuit's antitrust standing holding other than to repeat it by rote (see, *e.g.*, BIO 11 (asserting without explanation that petitioner's damages "were too indirect and speculative"), 21 (similar)) and does not deny the settled rule that a competitor is the *prototypical* antitrust plaintiff. See Pet. 16, 17-18 (citing, *inter alia*, *Associated Gen. Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 539 (1983) (standing denied because plaintiff "was neither a consumer nor a competitor")), 28-29 (collecting decisions of other circuits). Nothing about petitioner's status renders "indirect" or "speculative" its claim that it was injured by respondent's anticompetitive refusals to deal and denials of access to essential facilities, or its "price-cost squeeze." The Sixth Circuit nonetheless held that petitioner lacked "antitrust standing" as to its claims involving respondent's contracts with General Motors. Pet. App. 6a.[7]

The Sixth Circuit's holding conflicts with the precedents of this Court and other circuits, and (as the petition noted and respondent apparently cannot deny) produces absurd results. For example, the court held that petitioner lacked antitrust standing because General Motors could bring a claim against respondent as a putative customer of petitioner. Pet. App. 6a. But that conclusion ignores the fact that General Motors would be prohibited from suing because it is an indirect purchaser (see Pet. 21-22), such that under the court of appeals' holding *no party* could sue. That, however, is not even the most extraordinary result of the

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[7] To the extent that the opinion below invokes "antitrust standing" in the context of petitioner's remaining claims, it is simply conflating that doctrine with "antitrust injury," a point respondent acknowledges. See BIO 10 ("the court correctly ruled that Indeck had failed to plead antitrust injury and therefore lacked antitrust standing"). This is just another in the Sixth Circuit's extensive arsenal of errors. See *Greater Rockford Energy & Tech. Corp.* v. *Shell Oil Co.*, 998 F.2d 391, 301 n.13 (CA7 1993) ("As noted, antitrust injury and antitrust standing involve two separate inquiries. The crux of the standing analysis is whether the plaintiff is the proper party to vindicate the antitrust interest."), *cert. denied*, 510 U.S. 1111 (1994).

Sixth Circuit's decision – an honor that falls to the court's holding (which respondent studiously ignores) that respondent, as its own customer in purchasing electricity from its own cogeneration affiliate, would police its own efforts to drive out petitioner. Pet. 19-20; see Pet. App. 8a ("unfair pricing or unfair treatment of a customer [here, respondent] will lead that consumer to investigate alternate vendors in future contractual dealings"; requiring allegation that "Consumers Energy paid above-market prices for excess power" as a result of its own anticompetitive acts). To deny petitioner standing on that basis is not just insupportable; it is scandalous.

The Sixth Circuit's antitrust standing holding thus not only conflicts with decisions of this Court and other circuits, but it also is of substantial importance. Even if the decision below does not have the effect of eliminating all possible antitrust plaintiffs, it still eliminates the most likely enforcers of the antitrust laws: competitors. Unlike competitors, "[c]onsumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers" and "might fail to enforce their claims because of the insignificance of their individual recoveries." *Kansas* v. *Utilicorp United*, 497 U.S. at 215-16. Particularly given the ongoing transition to competitive energy markets, where individual consumers have a relatively limited stake in marginal increases in their power rates, it is essential that this Court preserve the rights of plaintiffs to challenge the anticompetitive acts of their rivals.

Certiorari accordingly should be granted to review the Sixth Circuit's holding that, as to certain of its claims against respondent, petitioner lacks "antitrust standing."

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the brief of the Michigan Attorney General, the petition for a writ of certiorari should be granted and the case set for plenary consideration or the judgment should be summarily reversed.

Respectfully submitted,

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